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No. 15248

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United States
Court of Appeals
for the Ninth Circuit

EMIL WENTZ and WILLIAM BERING JENSEN, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

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PAUL P. O'BRIEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Appeal:

Certificate of Clerk to Transcript of Record on 39

Designation of Record on (Appellee's—USCA) 102

Motion for Bail Pending..... 34

Order Granting Motion for Bail Pending... 35

Notice of 33

Orders Extending Time to Docket.....36, 37

Statement of Points and Designation of Record on (Appellants'—USCA)..... 100

Certificate of Clerk to Transcript of Record.... 39

Consent to Leave District (William Bering Jensen) 36

Designation of Record on Appeal (Appellee's—USCA) 102

Indictment 3

Instructions to the Jury Proposed by Defendants 38

Judgment and Committment:

William Bering Jensen..... 31

Emil Wentz 32

Minutes of the Court:

May 1, 1956—Arraignment and Plea..... 6

May 14, 1956—Hearing on Motions..... 12

May 21, 1956—Hearing on Motion to Dismiss, Jury Trial..... 19

May 23, 1956—Further Jury Trial..... 21-27

May 25, 1956—Hearing on Motion and Sentencing 28

Motion for Bail Pending Appeal..... 34

Order Granting 35

Motion for New Trial..... 30

Motion in Arrest of Judgment..... 29

Motion to Dismiss..... 7

Motion to Dismiss as to Defendants Schlising and Jensen for Lack of Jurisdiction..... 15

Affidavit of William Bering Jensen..... 17

Affidavit of Michael Victor Schlising..... 16

Motion Under Rule 7 F for Bill of Particulars 11

Names and Addresses of Attorneys..... 1

Notice of Appeal (Wentz and Jensen)..... 33

Order Denying Motion to Dismiss and Motion for Bill of Particulars 13

Orders Extending Time to Docket Appeal ... 36, 37

Statement of Points and Designation of Record on Appeal (Appellants'—USCA) 100

Transcript of Proceedings and Testimony 40

Witnesses:

McGee, M. G. (May 23, 1956)

—direct 68

—cross 76

Meaney, J. E. (May 14, 1956)

—direct 48

—cross 50

Meaney, J. E. (May 22, 1956)

—direct 61

Verdict:

William Bering Jensen 27

Emil Wentz 28

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ANGUS D. McEACHEN,

510 South Spring Street,
Los Angeles 13, California.

For Appellee:

LAUGHLIN E. WATERS,
U. S. Attorney,

LOUIS LEE ABBOTT,
Asst. U. S. Attorney,

Chief, Criminal Division,
600 Federal Building,
Los Angeles 12, California. [1]*

* Page numbers appearing at foot of page of original Transcript of Record.

United States District Court for the Southern District of California, Central Division

February, 1956, Grand Jury

No. 24950 CD

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL VICTOR SCHLISING, EMIL WENTZ, and WILLIAM BERING JENSEN,

Defendants.

INDICTMENT

[U.S.C., Title 18, Sec. 1343—Fraud by interstate and foreign wire]

The grand jury charges:

From on or about the 14th day of November, 1955, and continuing to on or about the 29th day of November, 1955, the defendants Michael Victor Schlising, Emil Wentz and William Bering Jensen devised, and intended to devise, a scheme and artifice to defraud Frank X. Pommer and Selma H. Pommer and to obtain money from the said Frank X. Pommer and Selma H. Pommer by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made: That the name of the

defendant Michael Victor Schlising was Karl Ober; that the name of the defendant Emil Wentz was James E. Walters; that an organization known as the Metropolitan Company owned all of the horses running at race tracks; that the defendant Emil Wentz was employed by the said Metropolitan Company as "confidence man" engaged in betting money on "fixed" horse races; that the defendant Emil Wentz was using confidential information received by him from the said Metropolitan Company to make bets on fixed horse [2] races for his own account; that the defendant Emil Wentz would pay to the said Frank X. Pommer and Selma H. Pommer and the defendant Michael Victor Schlising 25% of moneys won by him from bets so made if the said Frank X. Pommer and Selma H. Pommer and the defendant Michael Victor Schlising would place the said bets for him; that the surname of the defendant William Bering Jensen was Johansen; that the defendant William Bering Jensen was president of the American Club, Mexico, District Federal, Republic of Mexico, for a period of time including November 19 through November 24, 1955; that the said American Club was engaged in the business of accepting wagers on horse races; that the defendant Emil Wentz had, on November 19, 1955, made a bet on a horse race with the American Club in the sum of $101,500, consisting of $1,500 in cash and a check for $100,000; that as a result of the said bet the defendant Emil Wentz had won $203,000; that the defendant William Bering Jensen, as president of the said Ameri-

can Club, would pay $200,000 of its funds to the defendant Emil Wentz on condition that the defendant Emil Wentz show to the defendant William Bering Jensen $100,000 in cash as evidence that the said check in the amount of $100,000 would have been collectible if the wager in which it was used had been lost by the defendant Emil Wentz; that if the said Frank X. Pommer and Selma H. Pommer would advance $24,000 in cash to be displayed to the defendant William Bering Jensen in combination with $76,000 in cash to be furnished by defendants Michael Victor Schlising and Emil Wentz, said $24,000 would immediately thereafter be returned to the said Frank X. Pommer and Selma H. Pommer, together with an additional $25,000; that the defendant Michael Victor Schlising had displayed $100,000 to the defendant William Bering Jensen, and had received from the defendant William Bering Jensen an additional $200,000 in cash to be delivered to the defendant Emil Wentz; that the defendant Michael Victor Schlising thereafter bet and lost $200,000 [3] purportedly delivered by the defendant William Bering Jensen to him and all of the money purportedly displayed to the defendant William Bering Jensen, including the said $24,000 in cash delivered to the defendant Emil Wentz by the said Frank X. Pommer and Selma H. Pommer; and

On or about November 22, 1955 defendants Michael Victor Schlising, Emil Wentz, and William Bering Jensen, for the purpose of executing the aforesaid scheme and artifice, caused to be

transmitted by means of interstate and foreign wire a signal and sound from the City and County of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico.

A True Bill.

/s/ GEORGE DIETZLER,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

[Endorsed]: Filed April 25, 1956. [4]

United States District Court, Southern District of California, Central Division

No. 24,950 Criminal

MINUTES OF THE COURT

Date: May 1, 1956. At: Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Wm. C. Mathes, District Judge; Deputy Clerk: L. B. Figg: Reporter: J. D. Ambrose: U. S. Attorney, by Assistant U. S. Attorney Louis L. Abbott: Counsel for Defendants: A. D. McEachen.

Defendants present (on O/R) (on bond in Case No. 24,808-Cr.).

Proceedings: For arraignment and plea.

Defendants are arraigned and each defendant states his true name is as set forth in the Indictment and pleads not guilty to offense charged therein, without prejudice to defendants' rights to make motions as to this Indictment.

It Is Ordered that cause is set for jury trial 10 a.m., May 22, 1956, and it is stipulated and ordered that motions to be made by defendants may be filed not later than May 9, 1956, and may be noticed for hearing at 2 p.m., May 14, 1956.

JOHN A. CHILDRESS,
Clerk,

/s/ By L. B. FIGG,
Deputy Clerk. [5]

[Title of District Court and Cause.]

MOTION TO DISMISS

(Rules 7C, 12 Fed. Rules Crim. Proc.)

The indictment does not state an offense against the laws of the United States.

Title 18 of Section 1343 U. S. Code—Fraud by Wire: "Whoever, having devised or intending to devise any scheme or atifice to defraud, or for obtaining money or property by means of false or

fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined, etc. * * *"

The afore cited section is otherwise known as Section 18 (a) of the Communications Act Amendments, 1952, 66 Stat. 722. These Amendments are to the Communications Act of 1934 found in Title 47 of the U. S. Code. Section 153 of the Communications Act, 1934 Title 47 U. S. Code 153 is as follows:

Definitions (e): "Interstate communication or interstate transmission means, communication or transmission: (1) from any state, territory or possession of the United States * * * to any other [6] State, territory or possession of the United States * * * (f) Foreign communication or foreign transmission means communication or transmission from or to any place in the United States to or from a foreign country."

The indictment recites in part as follows: "On or about November 22, 1955 defendants Michael Victor Schlising, Emil Wentz, and William Bering Jensen, for the purposes of executing the aforesaid scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from the City and County of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence

to Mexico, District Federal, Republic of Mexico."

In Border Pipe Lining Co. v. Federal Power Commission, 171 Fed. 2nd. 149 (1948) there was a petition to review an order of the Federal Power Commission. The petitioners were exporters of natural gas to Mexico under permit from the Federal Power Commission. Petitioners output of natural gas went to an industrial consumer who transported the gas to Mexico and used it there. Petitioners had complied with the export requirements of the Act, but not the interstate requirements. The question before the court was whether or not petitioners were engaged in interstate commerce within the provisions of the Natural Gas Act. Setting aside the order, the court held that petitioners were not engaged in interstate commerce within the provisions of the Act. In so doing the court stated as follows: "Interstate commerce does not include foreign commerce, unless Congress by definition for the purpose of a particular statute includes them both in a single expression." Page 150 of the opinion sets out examples of the various definitions outlined by Congress. "The prime responsibility for making statutory meaning clear is on the Congress. It is bad for the court to twist strange results out of otherwise understood expressions of the legislature." [7]

In Powell vs. U. S., 112, Fed. 2nd 764, 4th Circuit 1940, the defendants were indicted for failure to observe their published tariffs under the Elkins Act, 49 U. S. Code 41. In this case it was argued by the Government that the shipment was not in

foreign commerce. The shipping order involved showed on its face "for export", the Court at Page 767 of the Opinion stated: "There can be no question but that the shipment was intended at its inception as a movement in foreign commerce * * * There was an original and continuing intention on the part of those having control of the shipment that unless rejected, it should proceed to a foreign destination and this, we think, was determinative of its character."

The defendants are charged with transmission by interstate and foreign wire a signal and sound from Los Angeles, California through points in Texas to Mexico.

The language used imparts continuity. It is obvious that there is but one message and that message originated at Los Angeles and was from the outset a foreign message to Mexico. As such it was not within the statute. The expression "thence" imparts continuity, that the following course is continuous with the one before it.

Flagg v. Mason, 141 Mass. 66, 6 N. E. 702.

It is respectfully submitted that the indictment should be dismissed.

/s/ ANGUS D. McEACHEN,
Attorney for Defendants. [8]

Acknowledgment of Service Attached. [9]

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause.]

MOTION UNDER RULE 7 F (FEDERAL RULES—CRIMINAL PROCEDURE FOR BILL OF PARTICULARS)

The defendants, and each of them, move for a Bill of Particulars in the above entitled cause as follows:

I.

The full context of the signal and sound transmitted by means of interstate and foreign wire as alleged on Page 3 of the indictment, last paragraph thereof, including the identity of the sender or senders of the sound and signal and the exact date when the signal and sound was transmitted, the person or persons to whom the signal and sound was transmitted, the destination of said signal and sound as indicated at the point of origin.

II.

How and in what manner the defendants, and each of them, caused said signal and sound to be transmitted by interstate and foreign wire as alleged on Page 3 of the indictment, Lines 8 and 9.

/s/ ANGUS D. McEACHEN
Attorney for Defendants [10]

Points and Authorities

Rule 7 F Federal Rules—Criminal Procedure.

The purpose of a Bill of Particulars is to define

more specifically the offense charged and to inform the defendants precisely of the offense.

U. S. v. Mangiaracina, 10 F.R.D. 415, W. D. Mo.

A Bill of Particulars must be specifically precise to enable the defendants to prepare for trial and not to be surprised.

Norris v. U. S., 152 Fed. 2nd, 808; Cert. Den. 328 U. S. 850. [11]

Acknowledgment of Service Attached. [12]

[Endorsed]: Filed May 9, 1956.

United States District Court
Southern District of California
Central Division

No. 24,950—Criminal

MINUTES OF THE COURT

Date: May 14, 1956, at Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Wm. C. Mathes, District Judge; Deputy Clerk: Louis Cunliffe; Reporter: Don P. Cram; U. S. Att'y., by Ass't. U. S. Att'y. Louis L. Abbott; Counsel for Defendants: A. D. McEachen.

Defendants not present.

Proceedings: For hearing on (1) motion of defendants to dismiss the Indictment, filed May 8, 1956, and (2) motion of defendants for bill of particulars, filed May 9, 1956.

Attorney McEachen, for defendants, makes a statement.

Attorney Abbott, for Gov't., makes a statement.

J. E. Meaney, witness for defendants, is called, sworn, and testifies over objections of U. S. Attorney.

Both sides stipulate that telegram to which Witness Meaney testifies is the one mentioned in the Indictment.

Said telegram is read into the record.

Court orders both motions of defendant (1) to dismiss the Indictment, and (2) for bill of particulars, denied; counsel for Gov't. to prepare formal order.

It is ordered that this cause be transferred to Judge Harrison for trial with Case No. 24,808-Cr.

It is ordered that trial date of May 22, 1956, is vacated. [13]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS AND MOTION UNDER RULE 7 F (FEDERAL RULES CRIMINAL PROCEDURE FOR BILL OF PARTICULARS)

The Motion to Dismiss, filed May 8, 1956, and the Motion under Rule 7 F (Federal Rules of Criminal Procedure for Bill of Particulars), filed May 9, 1956, having come on for hearing on May 14,

1956, the plaintiff appearing through Laughlin E. Waters, United States Attorney, by Louis Lee Abbott, Assistant United States Attorney, the defendants appearing through their counsel, Angus D. McEachen; oral evidence having been taken at the request of the said defendants, and certain Stipulations having been effected by the parties, and the Court being fully advised in the premises;

It is hereby ordered that the Motion to Dismiss, filed May 8, 1956, be and it is hereby denied;

It is further ordered that the Motion under Rule 7 F (Federal Rules Criminal Procedure for Bill of Particulars), filed May 9, 1956, [14] be and it is hereby denied.

Dated: This 14th day of May, 1956.

/s/ WM. C. MATHES
United States District Judge

Approved as to form:

/s/ ANGUS C. McEACHEN
Attorney for Defendants

LAUGHLIN E. WATERS
United States Attorney

/s/ LOUIS LEE ABBOTT
Assistant U. S. Attorney;
Chief, Criminal Division
Attorneys for Plaintiff. [15]

[Endorsed]: Filed May 18, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION OVER DEFENDANTS, MICHAEL VICTOR SCHLISING AND WILLIAM BERING JENSEN (Federal Rules of Criminal Procedure 12b(2)).

The defendants, Michael Victor Schlising and William Bering Jensen, move that the indictment be dismissed on the following grounds:

1. The Court is without jurisdiction over the person of each of them for the reason that they had been illegally abducted by Mexican authorities at their place of residence in Mexico City, Republic of Mexico and taken across the border of the United States at Laredo, Texas, and then and there delivered into the immediate custody of agents of the United States Government as indicated by the affidavits attached to this motion and made a part hereof.

/s/ ANGUS D. McEACHEN
Attorney for Defendants. [16]

Points and Authorities

Federal Rules of Criminal Procedure, Rule 12b (2).

United States v. Rosenberg, 195 F. 2nd 1583; Cert. Den. 344 U. S. 889.

There is an analogy here to the requirement that a confession must be voluntary to be admissible.

McNabb v. U. S., 318 U. S. 332, also

In re: Fried, 161 Fed. Md. 453; Cert. Den. 331 U. S. 858.

Here the Court passed on the propriety of a motion to suppress an involuntary confession.

Fifth Amendment, United States Constitution.

[Title of District Court and Cause.]

AFFIDAVIT OF MICHAEL VICTOR SCHLISING

State of California,
County of Los Angeles—ss.

Michael Victor Schlising, being by me first duly sworn, deposes and says: that he was a resident of Mexico City, Republic of Mexico during the month of January, 1956; that on the 17th day of January, 1956, affiant was taken into custody by Mexican authorities and detained; that although numerous requests were made by him that he be permitted to talk to an attorney, said requests were denied; that no proceedings whatsoever were had in Mexico City in connection with affiant's detention; that thereafter affiant was transported by automobile from Mexico City through Nueva, Laredo, Mexico, across the border between United States and Mexico where at Laredo, Texas affiant was immediately delivered into the hands of certain agents of the United

States Government; affiant further states that at no time during this period was he permitted to confer with a [18] lawyer or anyone else with respect to the aforesaid detention; that subsequent thereto affiant was taken in custody to the office of the United States Commissioner at Laredo, Texas, at which time he was arraigned on the indictment herein.

/s/ M. V. SCHLISING

Subscribed and sworn to before me this 17th day of May, 1956.

[Seal] /s/ JANE A. MELCHER,

Notary Public in and for the County of Los Angeles, State of California. [19]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM BERING JENSEN

State of California,
County of Los Angeles—ss.

William Bering Jensen, being first duly sworn, deposes and says: that during the month of January, 1956, this affiant was a resident of Mexico City, Republic of Mexico; that on the 17th day of January, 1956, affiant was taken into custody by Mexican authorities and detained; that although numerous requests were made by affiant that he be permitted to talk to an attorney, said requests were denied; that no proceedings whatsoever were had in Mexico

City in connection with affiant's detention and that thereafter affiant was transported by automobile from Mexico City through Nuevo, Laredo, Mexico, across the border between the United States and Mexico where at Laredo, Texas affiant was immediately delivered into the hands of certain agents of the United States Government; affiant further states that at no time during this period was he permitted to confer with a lawyer or anyone else with respect to [20] the aforesaid detention; that subsequent thereto affiant was taken in custody to the office of the United States Commissioner at Laredo, Texas, at which time he was arraigned on the indictment herein.

/s/ WM. B. JENSEN

Subscribed and sworn to before me this 17th day of May, 1956.

[Seal] /s/ JANE A. MELCHER,

Notary Public in and for the County of Los Angeles, State of California. [21]

Acknowledgment of Service Attached.

[Endorsed]: Filed May 18, 1956. [22]

United States District Court
Southern District of California,
Central Division

No. 24,950—Criminal

MINUTES OF THE COURT

Date: May 21, 1956, at Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Ben Harrison, District Judge;

Deputy Clerk: L. B. Figg; Reporter: J. D. Ambrose; U. S. Att'y., by Ass't. U. S. Att'y. Louis Lee Abbott; Counsel for Defendants: A. D. McEachen and Al Matthews.

Defendants present (on O/R) (on bond in Case No. 24,808-Cr.).

Proceedings: For (A) hearing motion of defendants Michael Victor Schlising and William Bering Jensen, filed May 18, 1956, to dismiss the Indictment for lack of personal jurisdiction over said defendants; and (B) jury trial as to all defendants.

Court convenes in Chambers at 2 P.M. Counsel are present. Defendants are not present. Attorney McEachen states that Attorney Al Matthews is associated as co-counsel for defendants.

Counsel make statements.

Court makes a statement and It Is Ordered that the motion of Defendants Schlising and Jensen to

dismiss the Indictment for lack of personal jurisdiction over said defendants is denied without prejudice to renewal of the matter and reconsideration on motion of defendants in the event of a verdict of guilty.

Court recesses: Court reconvenes in the courtroom at 2:15 P.M. Counsel are present as before. Defendants Wentz and Jensen are present, but defendant Schlising is not present.

It Is Ordered that a bench warrant be issued for the apprehension of Def't. Schlising and new bail is fixed for said defendant in the sum of $25,000.

Counsel and the Court make statements relative to Def't. Schlising's absence. It is stipulated by counsel for defendants that the case may proceed as to the selection of the jury and opening statements made in the absence of Def't. Schlising, and it is so ordered. It is also ordered that the order for issuance of a bench warrant and new bail for Def't. Schlising is vacated.

It is ordered that a jury be impaneled and trial proceed.

The following jurors, duly impaneled, are sworn to try this cause:

1. Madrienne M. Heinz
2. Patrick J. Costello
3. Margaret E. Best
4. Geraldine D. Harris
5. Virginia C. Mason
6. Fred B. Spencer
7. Evelyn L. Kridler
8. Emson L. Knorr
9. Zelick Holzman
10. Scott Metcalf, Sr.
11. Lin F. Spenzer
12. Leslie H. Burke

Alternate Juror: Frederick H. Chapman.

The Court read the Indictment to the prospective jurors prior to their impanelment. At 3 P.M. Court admonishes the jurors not to discuss this cause and declares a recess. At 3:10 P.M. Court reconvenes herein, and Def'ts. Wentz and Jensen, the jury and alternate juror, and counsel being present, Def't. Schlising is not present, trial proceeds.

Attorney Abbott makes opening statement for the Gov't.

At 3:35 P.M. Court admonishes the jurors not to discuss this cause and Orders cause continued to 9:30 A.M., May 22, 1956, for further jury trial.

JOHN A. CHILDRESS,
Clerk,

/s/ By L. B. FIGG,
Deputy Clerk. [23]

United States District Court
Southern District of California,
Central Division

No. 24,950—Criminal

MINUTES OF THE COURT

Date: May 22, 1956, at Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Ben Harrison, District Judge; Deputy Clerk: L. B. Figg; Reporter: J. D.

Ambrose; U. S. Att'y., by Ass't. U. S. Att'y. Louis Lee Abbott; Counsel for Defendants: A. D. McEachen and Al Matthews.

Defendants Wentz and Jensen present (on O/R) (on bond in Case No. 24,808-Cr.).

Proceedings: For further jury trial.

At 9:35 A.M. court convenes in Chambers. Counsel are present. Defendants are not present. Counsel and Court make statements relative to the fact that def't. Michael Victor Schlising is not present. Counsel for said defendant state that the trial may proceed in the absence of said defendant for the time being.

At 9:45 A.M. court convenes in the courtroom, and defendants Wentz and Jensen, counsel for both sides, and the jury being present, Def't. Schlising is absent, Court orders trial proceed.

Selma Pommer, witness for Gov't., is called, sworn, and testifies.

At 10:05 A.M. Court announces that it appears that Def't. Schlising is not yet present and inquires if counsel for said defendant wish to continue to proceed with the taking of evidence for a further reasonable time, and it is so stipulated and ordered.

Witness Pommer resumes her testimony.

Gov't. Ex. 1, 2, 3, and 4 are marked for ident.

At 11 A.M. Court admonishes the jury not to discuss this cause and excuses the jury for recess, and the jury leave the courtroom.

It is stipulated and ordered that the trial of

Def't. Schlising be severed from the other defendants and trial vacated as to Def't. Schlising, and that the trial proceed as to Defendants Wentz and Jensen.

It Is Ordered that a bench warrant issue for the apprehension of Def't. Schlising, as the said defendant is still not present. Court Orders bail of Def't. Schlising fixed in the sum of $25,000.

At 11:05 A.M. Court recesses. At 11:12 A.M. Court reconvenes herein, and all being present as before, including Defendants Wentz and Jensen, counsel for both sides, and the jury, Court orders trial proceed.

Witness Pommer is recalled and testifies further.

Gov't. Ex. 1 to 5 incl. are admitted in evidence, and Ex. 6 is marked for ident.

At noon Court reminds the jury of the admonition heretofore given and declares a recess to 1:30 P.M. At 1:30 P.M. court reconvenes herein, and all being present as before, including both of the said defendants now before the Court, counsel for both sides, and the jury, Court orders trial proceed.

Gov't. Ex. 7 and 7-A are marked for ident.

Roscoe Bradley Gaither and Mrs. E. C. Thaden, respectively, witnesses for Gov't., are called, sworn, and testify.

Gov't. Ex. 8, 8-A, 9, and 10 are marked for ident.

At 2:55 P.M. Court reminds the jury of the admonition heretofore given and declares a recess. At 3:05 P.M. court reconvenes herein, and all being present as before, including both of the said defend-

ants now before the Court, counsel for both sides, and the jury, Court orders trial proceed.

Manuel Liodas, witness for Gov't., is called, sworn, and testifies.

Plf's. Ex. 8 and 8-A are admitted in evidence.

J. E. Meaney, witness for Gov't. is called, sworn, and testifies.

Gov't. Ex. 11 is admitted in evid.

At 4 P.M. Court admonishes the jury not to discuss this cause and orders cause continued to 9:30 A.M., May 23, 1956, for further jury trial.

JOHN A. CHILDRESS,
Clerk,

/s/ L. B. FIGG,
Deputy Clerk. [24]

United States District Court
Southern District of California
Central Division

No. 24,950 Criminal

MINUTES OF THE COURT

Date: May 23, 1956, at Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Ben Harrison, District Judge.

Deputy Clerk: L. B. Figg; Reporter: J. D. Ambrose; U. S. Att'y, by Ass't U. S. Att'y Louis

Lee Abbott; Counsel for Defendants: A. D. McEachen and Al Matthews.

Defendants Wentz and Jensen present (on O/R) (On bond in Case No. 24,808-Cr.).

Proceedings: For further jury trial as to Def'ts Wentz and Jensen. Jury is present. Court orders trial proceed.

E. C. Thaden, and M. G. McGee, respectively, witnesses for Gov't, are called, sworn, and testify.

Gov't Ex. 12, 5, 6, 7, 7-A, 9, and 10 are admitted in evidence.

Gov't rests. Each defendant, out of hearing of the jury, moves for judgment of acquittal and Court orders said motions denied. Defendants rest.

At 10:25 AM Court admonishes the jury not to discuss this cause and excuses the jury until 1:30 PM, and the jury leaves the courtroom.

Court recesses to the Court's Chambers for conference with counsel relative to instructions to the jury.

At 1:30 PM court reconvenes herein, and all being present as before, including both defendants now before the Court, counsel for both sides, and the jury, Court orders trial proceed.

Each defendant renews his motion for judgment of acquittal and Court orders said motions denied.

Attorney Abbott argues to the jury for the Gov't.

Attorney Matthews argues to the jury for defendants.

At 2:30 PM Court instructs the jury as to the law applicable to this case. Court reminds the jury of the admonition heretofore given and declares a short recess. Court and counsel convene in the Court's Chambers relative to the jury instructions, and counsel for defendants make objections to the instructions.

Court reconvenes in the courtroom, and both defendants Wentz and Jensen, and counsel for both sides, and the jury being present,

Court concludes its instructions to the jury.

John Scheibe, Crier, is sworn as an officer to take charge of the jury during its deliberation upon a verdict. Court orders the alternate juror discharged and Alternate Juror Chapman leaves the jury box.

At 3:20 PM the jury retires to the jury room to deliberate upon its verdict. The original Indictment and exhibits in evidence are delivered to the jury pursuant to the Court's instructions.

Court recesses to await the verdicts.

At 4:25 PM court reconvenes herein, and both Defendants Wentz and Jensen, counsel for both sides, and the jury being present,

The jury presents its verdicts finding each of defendants Emil Wentz and William Bering Jensen guilty as charged in the Indictment (one count), and said verdicts are read in open court, affirmed by the jury, and ordered filed and entered, to wit: (see verdicts following):

Court Orders the jury discharged and excused until notified.

It Is Ordered that this cause as to both defendants Emil Wentz and William Bering Jensen be referred to the Probation Officer for investigation and report and continued to May 25, 1956, 9:30 AM, for sentence of both said defendants, and that both of the said defendants be remanded to custody herein and their bonds in Case No. 24,808-Cr. exonerated. Court will hear any motions on said date that defendants may file.

JOHN A. CHILDRESS,
Clerk,

/s/ By L. B. FIGG,
Deputy Clerk [25]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, find the defendant, William Bering Jensen, Guilty, as charged in the Indictment.

Dated: May 23, 1956.

/s/ SCOTT METCALF, SR.,
Foreman of the Jury [26]

[Endorsed]: Filed May 23, 1956.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, find the defendant, Emil Wentz, Guilty, as charged in the Indictment.

Dated: May 23, 1956.

/s/ SCOTT METCALF, SR.,
Foreman of the Jury [27]

[Endorsed]: Filed May 23, 1956.

United States District Court
Southern District of California
Central Division

No. 24,950 Criminal

MINUTES OF THE COURT

Date: May 25, 1956, at Los Angeles, Calif.

[Title of Cause.]

Present: Hon. Ben Harrison, District Judge.

Deputy Clerk: L. B. Figg; Reporter: J. D. Ambrose; U. S. Att'y, by Ass't U. S. Att'y Louis Lee Abbott; Counsel for Defendants: A. D. McEachen.

Defendants Wentz and Jensen present (in custody).

Proceedings: For (a) hearing such motions as defendants Wentz and Jensen may file, and (b) sentencing of defendants Wentz and Jensen on offense charged in the Indictment (one count) (upon verdicts of guilty).

Defendants Wentz and Jensen file written motions in arrest of judgment and for new trial, and Attorney McEachen argues thereon to the Court for defendants.

Court Orders said motions denied.

Court pronounces judgment and Sentences each of defendants Emil Wentz and William Bering Jensen to imprisonment for the period of five years and fines each of said two defendants the sum of $1,000. for offense charged in the Indictment.

Court states that if appeal is taken, it will admit defendants to bail.

JOHN A. CHILDRESS,
Clerk,
/s/ By L. B. FIGG,
Deputy Clerk [28]

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT (RULE 34, RULES OF CRIMINAL PROCEDURE.)

The defendants, Emil Wentz and William Bering Jensen, moye the Court to arrest the judgment for the following reasons:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. The Court is without jurisdiction over the person of defendant, William Bering Jensen.

/s/ ANGUS D. McEACHEN,
Attorney for Defendants [29]

Points and Authorities

Rule 34, Rules of Criminal Procedure.

Authorities mentioned in Motion to Dismiss, and All authorities cited in Motion to Dismiss for Lack of Personal Jurisdiction. [30]

[Endorsed]: Filed May 25, 1956.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The defendants Emil Wentz and William Bering Jensen move the Court for a new trial for the following reasons:

1. The Court erred in denying defendants Emil Wentz and William Bering Jensen, motion for acquittal at the conclusion of the evidence.

2. The Court erred in charging the jury and in refusing to charge the jury as requested.

3. The verdict is not supported by substantial evidence.

4. The Court erred in admitting testimony of witness, Mrs. E. C. Thaden, to which objections were made.

Los Angeles, California, this 24th day of May, 1956.

/s/ ANGUS D. McEACHEN,
Attorney for Defendants [31]

Points and Authorities

Rule 33, Rules of Criminal Procedure.

Authorities mentioned in Motion to Dismiss, on file herein. [32]

[Endorsed]: Filed May 25, 1956.

United States District Court for the Southern District of California, Central Division

No. 24950—Criminal

UNITED STATES OF AMERICA

v.

WILLIAM BERING JENSEN

JUDGMENT AND COMMITMENT

On this 25th day of May, 1956, came the attorney for the government and the defendant appeared in person and by counsel, A. D. McEachen and Al Matthews:

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of devising a scheme and artifice to defraud; and, for the purpose of executing said scheme and artifice, causing to be transmitted by means of interstate and foreign wire a signal and sound, in violation of 18 U. S. Code 1343; as charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years, and that the defendant pay a

fine unto the United States of America in the sum of One Thousand Dollars ($1,000.00).

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ BEN HARRISON,
United States District Judge [33]

[Endorsed]: Filed May 25, 1956.

United States District Court for the Southern District of California, Central Division

No. 24950—Criminal

UNITED STATES OF AMERICA

v.

EMIL WENTZ

JUDGMENT AND COMMITMENT

On this 25th day of May, 1956, came the attorney for the government and the defendant appeared in person and by counsel, A. D. McEachen and Al Matthews:

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of devising a scheme and artifice to defraud, and, for the purpose of executing said scheme and artifice, causing to be transmitted by means of interstate and foreign wire a signal and sound, in violation of 18 U. S. Code 1343; as

charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years, and that the defendant pay a fine unto the United States of America in the sum of One Thousand Dollars ($1,000.00).

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ BEN HARRISON,
United States District Judge [34]

[Endorsed]: Filed May 25, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellants: Emil Wentz, 828 South Federal Highway, Lake Worth, Florida, and William Bering Jensen, 838 South Grand Avenue, Los Angeles, California.

Name and address of appellants' attorney: Angus D. McEachen, 510 S. Spring Street, Los Angeles, California.

Offense: 18 U. S. Code, 1343, Fraud by Interstate Wire.

Name of institution where now confined, if not on bail: Los Angeles County Jail.

Concise statement of judgment or order, giving date, and any sentence: 5/25/56: Each defendant sentenced to imprisonment for a period of five years and fined the sum of $1,000.00. [35]

We, the above named appellants, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: May 25, 1956.

/s/ EMIL WENTZ,
/s/ WILLIAM BERING JENSEN,
Appellants [36]

[Endorsed]: Filed May 25, 1956.

[Title of District Court and Cause.]

MOTION FOR BAIL PENDING APPEAL

Appellants, Emil Wentz and William Bering Jensen, in the above entitled cause, move the Court for an Order admitting them to bail pending the appeal by them from the Judgment of the United States District Court for the Southern District of California, Central Division imposing sentence on the said defendants, dated May 25th, 1956, for violation of 18 U. S. Code, 1343, Fraud by Interstate Wire.

Notice of Appeal was filed with the Clerk of the United States District Court, Southern District of California, Central Division, on May 25th, 1956.

This Appeal involves substantial questions which should be determined by the United States District Court of Appeals.

Dated: Los Angeles, California, May 25th, 1956.

/s/ ANGUS D. McEACHEN,
Attorney for Appellants, Emil Wentz and William Bering Jensen.

[37]

Order Granting Foregoing Motion

Upon Motion of the above named Emil Wentz and William Bering Jensen, Appellants, and it appearing that Notice of Appeal from the United States District Court for the Southern District of California, Central Division, was filed on the 25th day of May, 1956, and that a substantial question is involved in this case which should be determined by the United States Court of Appeals,

It Is Hereby Ordered that Emil Wentz and William Bering Jensen be admitted to bail upon giving a bond in the sum of $20,000.00 each pending their Appeal to the United States Court of Appeals.

Dated: Los Angeles, California, this 25th day of May, 1956.

/s/ BEN HARRISON,
Judge

[38]

[Endorsed]: Filed May 25, 1956.

[Title of District Court and Cause.]

ORDER

Good cause appearing, the time for filing the record on Appeal and docketing the Appeal in the above entitled matter is extended to July 19th, 1956.

Dated: June 22, 1956.

/s/ BEN HARRISON,
Judge of the United States
District Court [39]

[Endorsed]: Filed June 22, 1956.

[Title of District Court and Cause.]

CONSENT TO LEAVE DISTRICT

Appellant, William Bering Jensen, is presently enlarged on bond pending his appeal in the above entitled cause.

Said bond restricts Appellant to the Southern District of California. Said restruction is modified as follows:

Pending the appeal herein, William Bering Jensen may depart the Southern District of California,

but may not depart the continental United States.

Dated: July 16, 1956.

/s/ BEN HARRISON,
United States District Court

JOHN A. CHILDRESS,
Clerk, U. S. District Court,
Southern District of California

/s/ By H. L. COFFEY,
Deputy

CONTINENTAL CASUALTY COMPANY,

[Seal] By (Illegible)
Attorney-in-Fact [40]

[Endorsed]: Filed July 16, 1956.

[Title of District Court and Cause.]

ORDER

Good cause appearing, the time for filing the record on Appeal and docketing the Appeal in the above entitled matter is extended to August 20th, 1956.

Dated: July 16, 1956.

/s/ BEN HARRISON,
Judge of the United States District Court [41]

[Endorsed]: Filed July 16, 1956.

[Title of District Court and Cause.]

DEFENDANTS' PROPOSED INSTRUCTIONS TO THE JURY

Instruction No. .....

The indictment refers to transmittal by interstate and foreign wire.

Interstate transmission means transmission from any state, territory or possession of the United States to any other state, territory or possession of the United States.

Foreign transmission means transmission from or to any place in the United States to or from a foreign country.

Communications Act of 1934 As Amended; 47 United States Code, 153. [45]

Instruction No. .....

Interstate commerce does not include foreign commerce, unless Congress by definition for the purpose of a particular statute includes them both in a single expression.

Boutler Pipe Lining Co. v. Federal Power Commission, 171 Fed. 2nd 149 (1948). [46]

Instruction No. .....

When the communication by wire shows the destination thereof at its point of origin, that fact is determinative of its character as an interstate or foreign communication.

Powell v. U. S., 112 Fed. 2nd 764. [47]

[Endorsed]: Filed July 27, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 47, inclusive, contain the original

Indictment;

Motion to dismiss;

Motion under rule 7F;

Order Denying Motion to Dismiss & Motion under rule 7F;

Motion to Dismiss for lack of personal jurisdiction over Defendants Schlising and Jensen;

Verdicts of defendants Jensen & Wentz;

Motion in Arrest of Judgment;

Motion for New Trial;

Judgments and Commitments of defendants Jensen and Wentz;

Notice of Appeal;

Motion for Bail Pending Appeal;

Order for extension of time to docket record on appeal;

Consent to leave district as to Wentz & Jensen;

Order for extension of time to docket record on appeal;

Designation of Contents of Record on Appeal;

Defendants' Proposed Instructions to the jury heretofore lodged in chambers;

which, together with a full, true and correct copy of the Minutes of the Court had on May 1, 14, 21, 22, 23, 25, 1956; and government's exhibits 1, 2, 3,

4, 5, 6, 7, 7A, 8, 8A, 9, 10, 11, & 4 volumes of reporter's transcript of proceedings, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 21st day of August, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk,
/s/ By CHARLES E. JONES,
Deputy

In the United States District Court Southern District of California, Central Division

No. 24,950-CD

UNITED STATES OF AMERICA

Plaintiff,

vs.

MICHAEL VICTOR SCHLISING, EMIL WENTZ, and WILLIAM BERING JENSEN,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Honorable William C. Mathes, Judge Presiding

Los Angeles, California, Monday, May 14, 1956.

Appearances: for the Plaintiff: Laughlin E.

Waters, United States Attorney; by Louis Lee Abbott, Assistant United States Attorney, Chief, Criminal Division. For the Defendants: Angus D. McEachen, Esq. 510 South Spring Street, Los Angeles 13, California. [1]*

The Clerk: Case No. 24,950-Criminal, United States of America vs. Michael Victor Schlising, Emil Wentz and William Bering Jensen.

Mr. McEachen: Ready for the defendants. There is a waiver as to each and all defendants in this matter.

The Court: Is the Government satisfied with the waiver?

Mr. Abbott: I examined the file on Friday and found no waiver. It may have been filed since then.

Mr. McEachen: It was filed before that. And then I checked the docket and it indicated a filing.

Mr. Abbott: I examined it in the presence of the present clerk, who indicated there was none on file.

The Clerk: When did you file it, Mr. McEachen?

Mr. McEachen: It was filed on Wednesday.

Mr. Abbott: I am satisfied with counsel's representation that it was filed.

The Court: We will proceed upon Mr. McEachen's statement.

Mr. McEachen: All right, your Honor.

I have a representative of Western Union here. Would you come forward, please, and take the stand?

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* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Mr. Abbott: I am going to object to the taking of any evidence at this time. [2]

The Court: What is this offered for, Mr. McEachen?

Mr. McEachen: This is offered, if your Honor please——

The Court: In support of what motion?

Mr. McEachen: Part of the motion to dismiss.

Mr. Abbott: The Government submits that such a motion is directed to the sufficiency of the indictment and no oral evidence could be properly admitted on any question raised by that motion.

Mr. McEachen: This is the situation, if your Honor please—and it has been passed upon by the Supreme Court in the case of Edwards vs. United States, 312 U. S. 473. And what we seek is the production of evidence which is the very foundation of our motion to dismiss.

The Court: What do you expect to prove by this witness?

Mr. McEachen: I expect to prove that a message was transmitted from the local office of the Western Union by one of the alleged victims here, showing the destination of the particular communication at the point of origin, upon which my whole theory of this matter is predicated. In other words, it is my position, as represented in the motion to dismiss, that it is the message as it is reflected in the transmission at the point of origin which determines whether or not it is an interstate or foreign communication. Of course, if it is patent that it is a foreign communication then it is obviously out-

side of the statute. That is my [3], purpose; in other words, going right to the core of the case right here now.

The Court: What you are seeking to show is that it was a telegram sent from Los Angeles to Mexico City?

Mr. McEachen: That's right.

The Court: The Government alleges that it was transmitted by way of Dallas, Texas.

Mr. McEachen: That's right.

The Court: Well, as I view it—will the Government stipulate to that?

Mr. McEachen: I haven't seen the wire, incidentally.

The Court: Will the Government stipulate that the message alleged to have been sent was addressed to someone in Mexico City?

Mr. Abbott: We will stipulate that is the fact, your Honor. That is not the sole fact material to the determination——

The Court: Well, one fact at a time. Is the message that the Government is going to rely upon here? Is the message which is charged in the indictment, is it here?

Mr. Abbott: I understand that the witness, in response to a subpoena duces tecum by the defendant, has it in his possession.

The Court: Don't you have a copy?

Mr. Abbott: I know its contents. [4]

The Court: Can't you gentlemen stipulate to a copy of it?

Mr. Abbott: There is this problem, that counsel

wishes to stipulate some but not all the facts material to this question.

The Court: What else is there material?

Mr. McEachen: Let's make the record clear on this point: I did discuss the matter with counsel at an earlier date in connection with the prospective trial of the case, and in the interest of saving some money along the line he brought up the subject of the wire passing through a point in Texas, San Antonio, Texas, and then sent on to Mexico City.

The Court: Well, I suppose the Government will be required to prove as part of its case that the message crossed state lines.

Mr. Abbott: And was received at San Antonio, Texas; was there decoded, a copy prepared, and placed on another line and sent into Mexico. As the court undoubtedly knows, Mexico does not have a private telegraph system. The telegraph is a Mexico government monopoly and at some point in or near San Antonio it becomes necessary for the message to be received, decoded and placed on the Mexican line, as the Government evidence will show. But I think we should not—in no event could our stipulation or the testimony of this witness be pertinent to the motion to dismiss. [5]

The Court: As I understand it we are not here today to rule on this part. We are here to rule on the sufficiency of the indictment, and it wouldn't be, strictly speaking, a part to be considered on a motion addressed only to the sufficiency of the indictment, would it?

Mr. Abbott: There is a good deal of authority

which the Government can cite to the court at this time in support of the proposition that not even a bill of particulars can be looked at to determine the question before the court at this time.

The Court: As to whether or not the indictment charges an offense——

Mr. Abbott: Yes, your Honor.

The Court: ——within the jurisdiction of the court?

Mr. McEachen: Within the jurisdiction of the court. However, there is a little different approach to it as I studied the section: where the communication sought to be introduced is the very heart of the alleged violation, if your Honor please.

Mr. Abbott: Of course, the Government is at a decided disadvantage in not being on notice that we were going to take oral evidence at this time. If it is proper—and the Government asserts it is not—to take oral evidence in connection with a motion of this type, the Government would call its own witnesses. But the Government had no [6] notice by way of counsel's moving papers that such a procedure would be followed here. And I think counsel would concede it would be unique. In my experience at the bar we never had a hearing on a motion to dismiss in which we took oral evidence on one of the issues, provided by the indictment, of a not guilty plea.

The Court: Well, the court will rule that in passing upon the sufficiency of the indictment only the four corners of the indictment may be looked at, except possibly to illumine the meaning of words.

I recall a case which the Supreme Court reversed, the Specter case, in which I had a motion to dismiss upon the grounds the statute was vague and indefinite. I considered the indictment and considered the statute and wrote a memorandum holding that the statute was unconstitutionally vague and indefinite and dismissed the action.

The Government appealed, and by the time it got back to Washington they had regulations and forms and all manner of things that I never saw or heard of in ruling here; and the Supreme Court took those and Mr. Justice Douglas, with the aid of the forms used by the Attorney General's office and regulations by the Attorney General's office, added all that to the statute; and when that was all added to the statute they decided the statute was perfectly definite and met the requirements of the Constitution. [7]

Now, they didn't say anything about taking evidence dehors the indictment in the opinion, but of course that is the effect of it. The effect of it was that the Government used regulations and forms promulgated by the Attorney General to buttress the insufficiency of a statute probably more directly; in an indictment, indirectly.

Mr. McEachen: I prepared that indictment. I am familiar with that case. But in this Edwards case that I cite— and I respectfully urge it upon your Honor in connection with this matter—the case definitely not only indicates it is definite authority for the proposition that evidence is proper, but as a matter of fact in the Circuit Court, the Cir-

cuit Court affirmed the lower court on that basis, which the Supreme Court later reversed.

The Court: How can you show by this witness, unless the Government stipulates, that the message he has is the message referred to in the indictment?

Mr. McEachen: Well, in that connection I have discussed the matter with the attorney for the Government, and with all due respect to him, if I recall correctly, he said they did not have the message. He didn't say they didn't have the contents of it, that is true. Maybe we can stipulate. I have never asked them directly to do that. But here is the point, your Honor——

The Court: I was considering that in [8] connection with your motion for a bill of particulars, and I was inclined to the view that you would be entitled to a copy of the message because, non constat, there may have been 40 messages sent by the same people on the same day, or other people.

Mr. McEachen: I have an answer to that one, too: by the indictment, your Honor, if you consider only the four corners of the indictment, the indictment recites "a message," or "a signal."

The Court: You reach that on a motion for a bill of particulars, don't you?

Mr. McEachen: I used the two approaches for that specific reason, if your Honor please. I thought I would be entitled to it on either basis.

The Court: You may swear the witness, and I will hear the witness's testimony, and then we will decide what to do with it after we hear it.

Mr. Abbott: May it be understood, in the interest

of brevity, that the Government makes an objection on the ground previously stated to all the testimony to be elicited from this witness so it won't be necessary to interrupt with further objections?

The Court: It may be so understood. [9]

J. E. MEANEY

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. McEachen): Mr. Meaney, did you produce a document pursuant to subpoena duces tecum issued to the Western Union Telegraph Company? A. I did.

Q. Are you an employee of the Western Union Telegraph Company? A. I am.

Q. Do you have such a document in your possession? A. I have.

Q. Does that document reflect matters which are handled in the regular course of the business of the Western Union company? A. It does.

Q. Is it a part of their records? A. It is.

Mr. McEachen: May I have the document?

The Witness: Not until the court orders me to produce it.

Q. (By Mr. McEachen): What is the date on the document?

A. The date is November 22, 1955. [10]

Q. What is the point of origin of the wire?

A. Los Angeles, California.

Q. And who was the sender?

(Testimony of J. E. Meaney.)

A. Mrs. Selma Morse, M-o-r-s-e.

Q. What point is indicated on the wire as the point of destination of the wire?

Mr. Abbott: Objection, your Honor. That calls for the contents of the document. It has not been adequately identified as to foundation and is not in evidence. And, therefore, a question as to content is improper at this time.

The Court: Overruled. I will rule that part of the foundation in this case is to show the addressee as well as the sender.

Will you tell us who, Mr. Meaney, is the addressee?

The Witness: The addressee is J. E. Walters; address, Hotel Reforma, Mexico D. F., Mexico.

Q. (By Mr. McEachen): Is there any other indication as to the destination of that wire?

A. No. That is the destination.

Mr. McEachen: I believe that is sufficient for the foundation purposes, your Honor.

The Court: How long have you been with Western Union, Mr. Meaney?

The Witness: Well, Judge, your Honor, I think 52 years. [11]

The Court: I thought it was about that.

Do you know how these messages are sent——

The Witness: You bet I do.

The Court: ——to Mexico City?

What is the technique or the modus operandi of sending one from Los Angeles to Mexico D. F.?

(Testimony of J. E. Meaney.)

The Witness: Well, this telegram was accepted on the telephone from Richmond 7-8038, was charged to that telephone; the subscriber, 1062 West 30th Street; filed 4:45 p.m., November 22nd; the address of J. E. Walters, Hotel Reforma, D. F. Mexico. And the text——

The Court: Just how was it sent down there?

The Witness: Well, we transmit it to Dallas, and Dallas relays it to San Antonio and San Antonio then sends it to Mexico City.

The Court: Now, may it be stipulated that the message that the witness has referred to is the message referred to in the indictment?

Mr. Abbott: May I take the witness on cross examination before answering the court's question in that regard?

The Court: Is there any objection?

Mr. McEachen: No, your Honor.

The Court: You may. [12]

Cross Examination

Q. (By Mr. Abbott): Mr. Meaney, do you know whether Western Union has any lines to the Republic of Mexico?

A. No, they have not, now.

Q. Then, what is the means by which a message is relayed from San Antonio, Texas to Mexico City?

A. Over the Mexican lines. We have our lines to the border, and the Mexico City lines take up from there into Mexico City.

Q. Do you know whether the message is taken

(Testimony of J. E. Meaney.)

off the wire and decoded at any point prior to the entry into Mexico?

A. Not after it—after the transmission from San Antonio, no.

Q. Well, is it decoded at any place in Texas?

A. It is sent to Dallas. And then we have an automatic machine which makes a reperforation and then it is sent to San Antonio and from San Antonio to Mexico City.

Q. Well, is there any place in the route between Los Angeles and the Mexican-Texas border at which the message is decoded? A. Oh, no, sir.

Q. Do copies of the message exist at any point in the offices of Western Union?

A. At Dallas it would exist on a tape, [13] what we call a reperforation.

Q. Isn't it a fact that a copy is made at San Antonio?

A. In San Antonio there would be a copy.

Q. And messages are decoded at that point prior to being transmitted to Mexico City?

A. Maybe we are not together on the word "decoded."

The Court: You mean transmitted?

The Witness: Retransmitted.

Q. (By Mr. Abbott): Isn't it a fact that at San Antonio, Texas, the electrical impulse is translated into a message, a written message in words?

A. That's right.

Q. And then that written message is again trans-

(Testimony of J. E. Meaney.)

lated into an electrical impulse, placed upon the wire to Mexico City?

A. That's right. The electrical impulse is put on tape reperforation and the tape goes through and prints the message.

The Court: The message is sent from here in English?

The Witness: It is delivered there in English to them.

The Court: Delivered in Mexico City, so there is no translation.

The Witness: No translation.

Q. (By Mr. Abbott): Isn't it a fact then that at the time the message is received in San [14] Antonio, Texas a full copy of it is made which becomes a part of the San Antonio files of Western Union? A. Yes.

Q. And isn't it a fact that at San Antonio some employee of Western Union Telegraph Company takes the written copy of the message, so received, and relays it onto to Mexico City?

A. That's right, retransmits it.

Q. To Mexico City? A. That's right.

Q. And for that purpose the lines of the Mexican government telegraph system are used, are they not?

A. That's right, for transmission and delivery.

Q. Now, do you know whether the routing used in this instance, Mr. Meaney, is the routing used in the ordinary course of business by Western Union? A. It is.

(Testimony of J. E. Meagy.)

Q. Is there any other routing of a message from Los Angeles to Mexico City in the ordinary course of business? A. No, no.

Q. Does Western Union have the physical facilities to send a message from Los Angeles to Mexico City directly across the California-Mexican line?

A. No. If we had any wire trouble in San Antonio or Dallas we would send it to New York City, and New York City [15] would send it to Mexico City. But we have no system whereby we could send it otherwise. It would have to go through some other way into Mexico.

Q. In other words, any message sent by Western Union to Mexico must necessarily be sent across the state line? A. That's right.

Q. There is no way by using existing physical facilities to send such a message across the California-Mexican line? A. Not into Mexico City.

Q. Is that because of the inadequate communication facilities existing between Baja, California and Mexico City?

A. Well, it's probably inadequate—not inadequate for our purposes.

Q. Well, you mean that you have other routing available which makes——

A. Emergency, storms or anything like that, we always find some way. Western Union must deliver, you know.

Q. And so if you can't go through San Antonio you go through New York in the manner you described? A. That is right.

(Testimony of J. E. Meaney.)

Mr. Abbott: The Government will stipulate that the message described by the witness is the message described in the last paragraph of the indictment.

The Court: Do you wish the contents of it to appear in the record?

Mr. Abbott: Yes, your Honor.

I would like to say in so stipulating, your Honor, that we adhere to the position that any evidence taken on this point, including our stipulation of facts, is not material to the motion. But we make the stipulation.

The Court: Very well.

Will you read the message itself, the words of the message?

The Witness: It reads: "Leaving Wednesday 3:45; arriving Mexico 11:15 p.m. Love." Signed "Selma."

The Court: Is there anything further from Mr. Meaney, gentlemen?

Mr. McEachen: No, your Honor.

Mr. Abbott: Nothing further, your Honor.

The Court: You may step down, Mr. Meaney.

The Witness: Thank you.

(Witness excused.)

The Court: Anything further, Mr. McEachen?

Mr. McEachen: I won't burden your Honor any further in connection with the matter of material indicated in the motion itself. I don't think that the brief filed by the [17] Government adequately meets the situation here. This statute is part of the Communications Act of 1934. The definitions indi

cated there are applicable, even though it appears in Title 18. And the statute itself excludes foreign messages; while in other parts of the Act you find them referring to "interstate" and "foreign." It is obvious that Congress omitted that and intended to omit that, and that a foreign transmission is not within the section. The Government is bound by that.

The cases that I have cited are right on the point. It is the message as it is transmitted at the point of origin that determines its nature, whether or not it be interstate or foreign; and any routing or re-routing or other mechanical features of the transmission of a message do not change the complexion of it. It is a foreign message from the outset and it cannot be interpreted as being any other type.

I have cited to the court various definitions of "interstate" and "foreign" as pointed out in one of the cases that I mentioned, which well footnotes the situation. And the two cases that I cited are cited purely for the purpose of showing that it is the express intention from the outset of the journey from the point of origin that determines the type of message it is, having in mind the distinction between an interstate and foreign message; and at that point it takes its nature as interstate or as a foreign [18] message, and the nature of it cannot be changed after that time.

The Court: The motion to dismiss will be denied. It is my view that the phrase "* * * transmitted by means of interstate wire * * *" as used in Section 1343 of Title 18 means if the message is trans-

mitted over state lines, whatever may be its destination. And, of course, that is the basis for making it a federal offense at all.

Now, there is no motion for a bill of particulars, is there?

Mr. McEachen: Yes, there is, your Honor.

The Court: In view of the Government's stipulation here today with respect to the message, is there any occasion for any further particulars?

Mr. McEachen: Well, we have asked for the particulars with respect to each of the defendants having caused—in what manner they caused these communications.

The Court: Isn't it pretty obvious that this may be analogized, the message itself may be analogized to an overt act done pursuant to a conspiracy. Isn't that the gist of it?

Mr. McEachen: It takes on those aspects, yes. Of course, we don't have a conspiracy case before you.

The Court: I suppose in the sense that they alleged they caused it; alleging in effect the conspiracy here and the setup caused it.

I don't see where you would need anything [19] further in detail than that to be able to plead and defend and identify the cause or crime asserted and the offense alleged. I was concerned about identifying the message as being a particular message, but apparently the testimony that has been taken this afternoon, plus the stipulation, would take care of that, would it not, in the record?

Mr. McEachen: It covers the situation. That was my principal point.

The Court: The motion for a bill of particulars will be denied.

The Government will prepare the orders on the motion. [20]

Los Angeles, California, May 21, 1956,
Monday, 2:00 P.M.

The Court: Case on trial.

The Clerk: 24,950 and 24,808, United States of America, plaintiff, vs. Michael Victor Schlising, Emil Weintz and William Bering Jensen, for jury trial as to all defendants.

Mr. McEachen: Ready for the defendants, your Honor.

Mr. Abbott: Ready for the Government, your Honor.

Mr. McEachen: May we approach the bench, your Honor?

The Court: Yes.

(The following proceedings were had without the hearing of the jury venire):

Mr. McEachen: The defendant Schlising is not here, your Honor, and I have no idea where he is.

I also have some motions to make and may that be done in chambers outside of the hearing of the jury?

The Court: Very well.

(The following proceedings were had in chambers out of the presence and hearing of the jury venire):

The Court: Shouldn't the defendants be present?

Mr. McEachen: There is a waiver on file and it is agreeable to have the matters heard in chambers without the presence of the defendants.

The Court: Very well. I have examined your authorities. I haven't, however, examined the authorities presented by [5] the Government.

In addition to that I consulted with my colleagues at a round table conference.

I know that it is your desire to get through with this case this week.

Mr. McEachen: I understand that, your Honor.

The Court: And I do also.

Mr. McEachen: And I understand that, your Honor.

The Court: I am going to deny your motion but it is a proper matter to bring up on a motion for new trial.

I am perfectly willing that your motion be submitted and that you have a running objection on the grounds stated in your motion throughout the trial so that your rights will be properly protected.

If there is not a conviction then there is nothing to worry about.

Mr. McEachen: I appreciate that, your Honor.

The Court: But if there is a conviction then I will consider your motion on a motion for a new trial.

Mr. McEachen: May I indicate Mr. Matthews' presence here as co-counsel. He will be associated with me in the trial of the case. Pardon me, did you have something?

Mr. Abbott: When you are finished.

Mr. McEachen: All right. In other words, that will avoid any necessity of presenting anything further at this [6] time with regard to the motion.

The Court: I have read your motion and authorities and I have read the affidavits.

Mr. McEachen: Yes, your Honor.

The Court: And I am taking the position that we do have jurisdiction of the parties and that we have a right to proceed.

Mr. Abbott: May it please the court, this motion to dismiss, which is the second motion to dismiss, was first served upon our office at 3:00 o'clock p.m. Friday and as a result we have just completed the preparation of our opposition to the motions. I would like to——

The Court: I would like to have that because I want to see if you can support the position I have taken or whether there are any cases to the contrary.

I am not making a conclusive ruling on the motion at this time. I want that understood.

Mr. McEachen: Yes, your Honor.

The Court: We have called a jury panel here. You have had a long time to prepare and present this motion.

Mr. McEachen: I understand that, your Honor. I will say in that regard, however, that the import of it had not come to me at the time that I prepared the other motion, otherwise it would have been prepared and presented earlier.

The Court: I am sorry it didn't come in sooner so that [7] somebody else would have had to pass

upon it, but I have gone over it again this morning and have done considerable research on the question and I don't feel the motion is well taken. However, it may be well taken on a motion for new trial in the event there is a verdict against you. If there is a verdict in your favor then it is immaterial.

Mr. McEachen: In reading the Rosenberg case I find there was a matter of similar circumstance. The defendant first brought it to the attention of the court in a motion in arrest of judgment.

The appellate court said in substance that the motion was timely and that if the court found the defendant's position was well taken it could grant a judgment of acquittal notwithstanding the verdict and ~~but the~~ Government appeal.

Mr. Abbott: May I say this, sir?

The Government was not served with adequate notice and has not waived notice in connection with this motion and does not waive notice in connection with the motion.

Further, in addition to the authorities cited in our memorandum, we have just noted that in the advance sheet in the Schmittroth case—Bert Strand, Sheriff, vs. Schmittroth which was an appeal from a judgment in this district, contains a complete discussion of the authorities on this point.

I don't think that is cited in our memorandum.

* * * * *

Los Angeles, California, May 22, 1956,
Tuesday, 9:30 A.M.

* * * * *

J. E. MEANEY

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: J. E. Meaney. [210]

Direct Examination

Q. (By Mr. Abbott): Mr. Meaney, what is your occupation?

A. Chief special agent, Western Union Telegraph Company.

Q. How long have you been employed by Western Union, Mr. Meaney? A. 52 years.

Q. You are fairly well acquainted there, I take it now? A. I hope so—I am.

Q. What positions have you held in the company in addition to your present position?

A. Well, all the way from messenger up to manager and operations manager, city commercial manager, accounting, personnel.

Mr. Matthews: I will stipulate he knows more about it than the president does. I know Mr. Meaney.

Mr. Abbott: I will accept the stipulation.

Q. (By Mr. Abbott): Mr. Meaney, have you appeared today in response to a subpoena duces tecum? A. I have.

Q. And have you brought with you the documents described in that subpoena duces tecum?

A. I have.

Q. What is that document, sir?

A. It is a telegram telephoned from telephone

(Testimony of J. E. Meaney.)

number [211] Richmond 7-8038 Los Angeles, dated November 22nd, 1955.

Q. To whom is that telegram addressed?

A. J. E. Walters, Hotel Reforma, Mexico, D. F., Mexico.

Q. And how is that signed, Mr. Meaney?

A. It is signed "Selma."

Q. Now, is what you are examining the office copy of a telegram that was put on your wires, Mr. Meaney? A. It is.

Q. And does it constitute the entire record maintained by Western Union in Los Angeles relative to that telegram? A. It does.

Q. May I have it to mark it as an exhibit, sir? Actually I see you have with you not one but several other papers. Do any of those papers relate to the telegram described in the subpoena duces tecum, Mr. Meaney?

And while you are looking I will ask the clerk to mark the document last described by the witness as Government's Exhibit next in order for identification.

The Clerk: Government's Exhibit 11 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 11 for identification.)

Q. (By Mr. Abbott): Is Government's Exhibit 11 for identification, Mr. Meaney, a document that is maintained in the regular course of business by the Western Union Telegraph [212] Company?

A. It is.

(Testimony of J. E. Meaney.)

Q. And is it the regular course of business for Western Union to make such a record at or about the time that it accepts it and sends the telegram described in the record?

A. Well, immediately it is transcribed as the party is telephoning it to the operator.

Q. This is a record made immediately during the transaction? A. Immediately.

Mr. Abbott: We offer Government's Exhibit 11 in evidence, your Honor.

Mr. Matthews: May we see it, your Honor?

(Document handed to Mr. Matthews.)

Mr. McEachen: If your Honor please, there will be an objection at this time to the introduction of the document in evidence. The objection is based primarily upon the fact that the document itself indicates that the origin of the document is in Los Angeles, California and that at the point of origin the document was destined for Mexico City, D. F., and that as such it is a transmission to a foreign country and as such not within the statute under which the defendants here are prosecuted, which pertains only to interstate transactions.

Mr. Abbott: Your Honor, in view of counsel's objection [213] may I have a few moments? I would like to ask a few more questions relating to the foundation before the court rules.

The Court: Yes.

Q. (By Mr. Abbott): Mr. Meaney, are you familiar with the customary and usual routing of telegrams from Los Angeles to Mexico City?

(Testimony of J. E. Meaney.)

A. I am.

Q. What is the customary and usual routing of such telegrams?

A. Well, after it is received here it is transmitted automatically to Dallas, and then from Dallas it is transmitted again from Dallas to San Antonio.

Q. Both in Texas? A. Pardon me?

Q. Both in Texas, sir?

A. Both in Texas. And when it gets to San Antonio, the hard copy, what we call a copy, a hard copy is made in San Antonio and then retransmitted from San Antonio over Mexican lines to Mexico City.

Q. Now, is the copy at San Antonio identical with the text of the message and the addresses and signature of the message as first transmitted at Los Angeles.

A. Well, not seeing the copy at San Antonio I couldn't say that.

Q. In the ordinary course of business? [214]

A. Yes, in the ordinary course of business.

The Court: You have no direct lines to Mexico City, have you?

The Witness: No, sir.

The Court: It has to go to a place and from there it is transmitted over the Mexican telegraph lines?

The Witness: Yes, over Mexican telegraph lines from our office in San Antonio.

Q. (By Mr. Abbott): At San Antonio does the

(Testimony of J. E. Meaney.)

message come in over one line and is it then subjected to some physical handling before it is put on another line?

A. It comes over what we call a printer and makes a copy and then they transmit them—they make a copy—they make a copy and transmit that to Mexico City.

Q. Well, is the message handled in some fashion by employees at San Antonio between the time it comes off of one line and the time it is put on another line? A. Oh, yes, yes.

Q. Where is the point where Western Union lines connect with the line operated by the Mexican government? A. San Antonio.

Q. Right at San Antonio or in that general vicinity? A. San Antonio.

Q. Is there any direct telegraphic communication across the California-Mexican border and connecting Los [215] Angeles with Mexico City?

A. No, sir.

Q. Does Government's Exhibit 11 for identification bear any serial number by which it is identified in the records of the Western Union, Mr. Meaney?

A. Yes. Here is the number. This equal sign D indicates what we call the routing. D means Dallas and it is automatically switched on the machine to Dallas and it is numbered 484. That is the number of the telegram that is transmitted to Dallas.

Now, when they receive that at 4:45 p.m. and to show you what good service we have, it was transmitted at 4:50 to Dallas.

(Testimony of J. E. Meaney.)

Q. All right, sir. We will renew the offer of Government's Exhibit 11 in evidence.

Mr. McEachen: I wish to elaborate on my objection.

My objection is predicated upon the fact that the statute here in question is part of the Communications Act of 1934 as amended, which Act defines interstate communications and foreign communications as follows:

"Interstate communications or interstate transmissions means communication or transmissions——"

Mr. Abbott: Your Honor, I am sorry to object but this matter has been argued and ruled upon and in any event it would not be appropriate for argument at this time. There [216] has been a ruling on this very point.

The Court: I want him to make his record because I am going to overrule his objection.

Mr. Abbott: I will stipulate he may incorporate by reference all the arguments and briefs he has previously filed up to this point, your Honor.

That stipulation is tendered in the hopes we can avoid a repetition of the argument at this time.

The Court: I am not going to listen to much argument. Don't worry about that, counsel. We are going to get through with this case this week.

Mr. McEachen: So far we haven't taken up very much of your time, your Honor.

The Court: I am appreciative of that, too.

Mr. McEachen: Thank you.

(Testimony of J. E. Meaney.)

Mr. Abbott: I might say the Government's case is moving more rapidly than we estimated, your Honor. We will be able to meet the time limit.

Mr. McEachen: I only wish to point out one thing. There is a definite definition as to interstate communications within that Act and that Act also makes definite definitions with respect to foreign communications and I want to call your Honor's attention, with respect to the objections to the introduction of this evidence, and on the basis that this communication by its very nature is a foreign communication [217] only.

The Court: Objection overruled. It will be admitted.

The Clerk: Government's Exhibit 11 in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 11, was received in evidence.)

The Court: I don't know how a telegraphic message could get out of the State of California without crossing a state line. The message itself had to cross a state line. It had to cross the Arizona and New Mexico borders before it hit Texas.

Mr. McEachen: My only basis——

The Court: On account of the designation, I understand.

Mr. McEachen: It is based upon my——

The Court: If this law doesn't cover this kind of offense, if it is an offense, in view of what has happened, or if the jury believes, for instance, the first witness on the stand here, without making any comment on the evidence and I am not going to make

(Testimony of J. E. Meaney.)

any comment on the evidence now or any other time, but at least it shows a prima facie case according to my view under the statute. But whether the reviewing courts agree with me is a different matter.

Mr. McEachen: Well, of course, that is the exact purpose of my objection.

The Court: I understand. You are protecting your record. [218]

Mr. McEachen: My position has been reserved and it is incorporated in the motions to dismiss which is completely in the record.

The Court: I think your record is protected.

* * * * *

Los Angeles, California, May 23, 1956,
Wednesday, 9:30 A.M.

* * * * *

M. G. McGEE

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name. [239]

The Witness: M. G. McGee.

The Court: You will have to speak up.

The Witness: McGee.

Direct Examination

Q. (By Mr. Abbott): What is your occupation, sir?

A. I am superintendent of the Western Union Telegraph Company at San Antonio, Texas.

(Testimony of M. G. McGee.)

Q. How long have you been employed by Western Union? A. 41 Years.

Q. And are you the chief officer or employee of Western Union at San Antonio? A. Yes, sir.

Q. And as such do your duties include general supervision and responsibility for messages going from points in the United States through San Antonio to points in Mexico? A. Yes, sir.

Q. Have you brought with you today pursuant to a subpoena duces tecum, a record of the San Antonio office of Western Union? A. Yes, sir.

Q. Will you describe that record, please?

A. I have in my hand a telegram which was sent from Los Angeles at 4:45 p.m., Pacific time, on November 22nd, addressed to J. E. Walters, Hotel Reforma, Mexico City, [240] Mexico, reading:

"Leaving Wednesday 3:45. Arriving Mexico 11:15 p.m. Love."

And it is signed "Selma."

Q. Now, does that telegram have any identifying numbers or letters on it? A. Yes, it does.

Q. What are they?

A. It has the number under which the telegram was transmitted from Los Angeles to Dallas, the number from which Dallas transmitted the message from Dallas to San Antonio and also a number where we sent it from San Antonio to Mexico City.

Q. What is the Los Angeles identifying number? A. LY484.

Q. Is the telegram from which you are now

(Testimony of M. G. McGee.)

reading a document which is prepared in the ordinary course of business of Western Union?

A. It is.

Q. And is it the ordinary course of business of Western Union to make such a record at or about the time of the transmission which is there described?

A. This is the regular procedure for handling traffic of this sort.

Q. In other words, would such a record as you are now [241] holding be made at or about the time that the transmission comes in on the wire from Los Angeles via Dallas? A. Yes.

Q. May I have the document, sir.

Mr. Abbott: May the document described by the witness be marked Government's next in order?

The Court: Has counsel seen it?

Mr. McEachen: I haven't seen it.

The Court: It may be so marked.

The Clerk: The document referred to is marked Government's Exhibit 12 for identification.

(The exhibit referred to was marked Plaintiff's Exhibit 12 for identification.)

Q. (By Mr. Abbott): Would you describe how the messages from Los Angeles to Mexico City are routed, Mr. McGee?

A. The normal routing of telegrams from Los Angeles to Mexico City is through Dallas, and from Dallas to San Antonio and then from San Antonio to Mexico City.

Q. Now, are the lines connecting Los Angeles

(Testimony of M. G. McGee.)

and Dallas wholly within the continental limits of the United States? A. They are.

Q. And is that also true of the lines connecting Dallas and San Antonio? A. That is correct.

Q. What is the physical handling of the transmission [242] at Dallas? What happens there with respect to such a message?

A. The messages, when they are sent from Los Angeles or sent through what we call a perforated transmitter, a tape is punched with a keyboard affair and then the punched tape is sent—put through a transmitter and as that tape goes through the transmitter it reproduces the message on a similar tape in the Dallas reperforater center and that reperforated tape in Dallas is then sent through anothor transmitter which reproduces the same telegram at San Antonio.

Q. And what happens with respect to that same message when it is received at San Antonio?

A. The messages come into San Antonio on a tape, a gummed tape and it is gummed down on a blank as it is there, and then it goes to the operator who sends all messages to Mexico City, for transmission.

Q. Now, when the message is received at San Antonio and is recorded on a gummed tape and the tape is placed on a blank, is the result a message similar to the message which would in fact be delivered at San Antonio had that been the point of destination?

Mr. McEachen: I will object to that as calling

(Testimony of M. G. McGee.)

for a conclusion of the witness and not within the issues of this case.

Mr. Abbott: Perhaps we can meet the objection by offering [243] the record in evidence, your Honor, now that counsel has had a chance to inspect it. We offer Government's Exhibit 12.

The Court: It will be admitted.

(The exhibit referred to, marked Plaintiff's Exhibit 12, was received in evidence.)

Mr. Abbott: May Government's Exhibit 12 be shown to the jury?

The Court: All exhibits will be shown to the jury either here or in the jury room.

Mr. Abbott: Would it be permissible to show it to the jury now?

The Court: He has already read the telegram.

Mr. Abbott: I thought the jury might be interested in the form and appearance of the document.

The Court: I have no objection to its being passed to the jury.

Mr. McEachen: Has there been an offer to admit that into evidence, if your Honor please?

The Clerk: I understood the court to say it was admitted.

The Court: Yes, it is admitted.

Mr. McEachen: May I make a motion to strike and to renew my objection based on the former argument made in connection with the nature of the wire?

The Court: Yes. The objection is overruled.

(Testimony of M. G. McGee.)

(Document handed to the jury.)

Q. (By Mr. Abbott): Now, you described the means by which the telegrams comes into San Antonio, Mr. McGee, and comes off the wire and is recorded. What happens next, sir?

A. The message is then given to the operator working the circuit to Mexico City and it is then—another tape is prepared, perforated and that tape is passed through a transmitter and as it passes through the transmitter it automatically reproduces the same telegram at Mexico City.

Q. Is that similar to or different from the procedure that would be followed if a message were initiated in San Antonio to be sent to Mexico City?

Mr. McEachen: I object to that as being immaterial.

The Court: What is your point?

Mr. McEachen: Pardon me, your Honor.

The Court: He is testifying about the procedure.

Mr. McEachen: It is not material to the issues of this case, what happens to a message that is sent from San Antonio.

The Court: I think the objection is well taken, counsel.

Q. (By Mr. Abbott): Well, is the transmission from San Antonio to Mexico City one that requires a number of acts by some human being or is it an automatic thing that is done by machines?

Mr. McEachen: Same objection. [245]

Mr. McEachen: As to this message?

(Testimony of M. G. McGee.)

Mr. Abbott: As to this message, yes.

The Court: Objection overruled.

The Witness: Will you state the question again?

Q. (By Mr. Abbott): I can perhaps make it more clear. I realize it may have been uncertain.

Is there the act of some employee of the company required to begin the transmission from San Antonio to Mexico City?

A. That is correct. An employee of our office has to handle the message. In fact all of the messages that are destined to Mexico City have to be prepared and transmitted by our operator.

Q. Now, is there a direct line from San Antonio to Mexico City or are there way points?

A. They are direct circuits.

Q. Do those circuits go by way of Nueva Laredo?

A. They go through there but there is no stop. What I mean by that is, they go direct from San Antonio to Mexico City. There are no other offices connected on the circuit.

Q. But at what point on the border, if you know, does the line cross?

A. The line crosses the river over the bridge between Laredo, Texas and Nueva Laredo, Mexico.

Q. I guess my Spanish isn't very good—Nuevo?

A. Nueva, N-u-e-v-a.

Q. Who owns the line from San Antonio to the point where it crosses the border in the fashion you have described?

(Testimony of M. G. McGee.)

A. The boundary line is in the middle of the river or the bridge there between Laredo and Nueva Laredo and technically the circuits are joined at the boundary. However, for physical purposes the lines, power lines go all the way over. In other words, the same wire is there. There is no break in the wire there in the middle of the bridge. The wire is continuous from Laredo, Texas to Nueva Laredo, Mexico and the Western Union Company and the Mexican government share in the cost of that circuit.

Q. Now, sir; do you know the customary and usual routing of telegrams from points throughout the United States to Mexico City? A. Yes.

Q. What is that routing?

A. We have four connections between the United States and Mexico.

Q. Would you confine your answer to Mexico City?

A. All right. Mexico City. The circuits—New York works directly with Mexico City and handles the traffic for the 12 northeastern states.

The balance of the traffic between the United States [247] and Mexico is handled through San Antonio.

Q. Now, is there any direct wire communication between Los Angeles and Mexico City crossing the California-Mexican border? A. No.

Mr. Abbott: No further questions, your Honor.

The Court: Any cross examination?

Mr. McEachen: Yes, your Honor.

(Testimony of M. G. McGee.)

Cross Examination.

Q. (By Mr. McEachen): Mr. McGee, would there be any indications on this wire by means of symbols as to its origin and destination?

A. Of course it shows it originated right here. That is the normal place to show where a message originates.

Q. Now, you are referring to the words "Los Angeles, California"?

A. Los Angeles, California, that is right. That is always considered the date line or originating office.

Q. Now, there are other symbols on here. Where were these symbols made?

A. They were made here in Los Angeles.

Q. Now, starting, for example, above the border line which surrounds the message I see the symbols "DB654." What do they represent?

A. That is the number that the Dallas office put [248] on the message when they send it down here.

Q. When you say "down here" what do you mean? A. I mean San Antonio.

Q. What does the symbols LC337 indicate?

A. That is the circuit.

Q. And what circuit does that designate?

A. That is Los Angeles.

Q. And does it have any further meaning?

A. No, sir.

Q. Well, then, what do you mean by that generally? Is that a symbol indicating that the message

(Testimony of M. G. McGee.)

emanated from Los Angeles? A. Yes, sir.

Q. Does it mean anything more?

A. No, sir.

Q. That is all? A. That is all.

Q. Now, let us get down to the symbols inside of the border. In the upper left-hand corner I see a symbol L. What does that refer to?

A. That is the circuit. Those are the circuits identifying numbers.

Q. Well, what circuit does it identify?

A. We will have a series of circuits and each one of them has a particular letter or number to indicate a circuit [249] and that is what those are.

Q. Well, what type of circuit would you say that indicates?

A. Well, the normal, regular everyday circuit that we work.

Q. What is the origin of that circuit and the destination?

A. Well, it indicates that the circuit between Los Angeles and Dallas—that is the circuit between Los Angeles and Dallas, Texas.

Q. All right. And the rest of this—is there any further or different meaning?

A. No, sir; only each message has a different number on it and this happens to be the number of the message under that circuit.

Q. Referring to 484 after the letters LLY, is that correct? A. Yes, sir.

Q. Now, the letter MEX, what do they refer to?

A. That indicates it is traffic going to Mexico.

(Testimony of M. G. McGee.)

Q. And where is that affixed by the Western Union? A. At Los Angeles.

Q. And the other symbols, the number 8 following that? A. That is the number of words.

Q. And PD? [250]

A. Means it was paid for in Los Angeles.

Q. Does it indicate at what type of rate it was paid for?

A. In the absence of any other indicator that means it was sent at a fast message rate, full rate.

Q. Is there any indication of a differentiation here—that is, whether or not it was sent at an interstate or foreign rate?

A. We consider from our accounting records, that the Mexico traffic is considered a part of our domestic traffic.

Q. From an accounting point of view?

A. That is right and our——

Q. In other words, there is no differentiation from the point of view of accounting between a rate interstate and a rate sent to a foreign country, for a message sent to a foreign country or at least to Mexico? I am trying to clarify rather than confuse you.

A. I am not sure that I exactly understand but I will say that we have certain classes of traffic that we consider international traffic.

Q. I see.

A. But we do not consider Mexico as international traffic.

Q. Even though it is international?

(Testimony of M. G. McGee.)

Mr. Abbott: I object. This witness it not going to [251] testify as to what international means. He is here to testify as to what Western Union does.

The Court: That is quibbling.

Mr. McEachen: It is argumentative. I will withdraw it.

The Witness: You are talking about accounting—I thought that was what you had in mind.

The Court: Then you have an accounting with the Mexican government, do you?

The Witness: Yes, sir.

Q. (By Mr. McEachen): Now, with respect to this particular message, do you have any idea how long it was in transit from the point of origin at Los Angeles to Mexico City?

A. If you will let me have it I will tell you.

(Document handed to the witness.)

A. It was given to our office here in Los Angeles at 4:45 p.m. Pacific time. It reached San Antonio at 7:04 p.m. Central time, two hours difference in time. In other words, 4:45 p.m. here is 6:45 there so it was 19 minutes from Los Angeles to San Antonio. And we sent it to Mexico City at 7:04 p.m.—No, 7:17 p.m. In other words, it was 32 minutes between Los Angeles and Mexico City.

Q. I show you Government's Exhibit 11 and ask you to compare Government's Exhibit 11 with Government's Exhibit 12 and indicate if there is any difference in them insofar as the message is concerned? [252]

A. They look identically the same. What I mean

(Testimony of M. G. McGee.)

by that is, the operator transmitted it just exactly what she was supposed to transmit. There is certain information on the sending blank here that is not transmitted, such as the telephone number and the address, local address of the person who sent it.

Here is your MEX 8 PD.

Here is the first thing the operator sends, 484 LLY and then here is your MEX PD, which means paid and then, of course, we have Los Angeles and there is the filing time, 4:45 p.m. and then the operator starts out here and in here is the destination and here is the signature.

Q. Now, this destination as indicated here on Exhibit 11, Mexico D. F., that is taken off and handled where on the other exhibit, Exhibit 12?

A. The question now has to do with——

Q. In other words, where in this exhibit, and we are referring to Exhibit No. 12, is the term "destination Mexico, D. F., Mexico" found in Exhibit 11? Is that made a part of the second one?

The Court: Isn't that a question of fact for the jury to determine, counsel?

Mr. McEachen: I just wanted to ask how it is transcribed.

The Witness: Transcribed where?

Mr. McEachen: I will withdraw the question.

Q. (By Mr. McEachen): As you familiar with the transmission of messages by wire to Canada?

The Court: Just a moment. I don't think that is material. We are only interested in the telegram to Mexico City.

(Testimony of M. G. McGee.)

Talking about these circuits, Mr. Witness, the circuits run from Los Angeles, across Arizona and New Mexico into Texas, is that correct?

The Witness: That is right.

Mr. Matthews: I move to strike that, your Honor, on the ground that we object to your question on the ground it calls for a conclusion of the witness unless he is physically aware of that fact.

The Court: Do you know that to be a fact?

The Witness: Well, I haven't traced them down, no, sir, but that is—we have what we call wire charts and, or a blue print in other words, showing the routing of the circuits and according to the blue prints and charts that is the way the circuits run.

The Court: Objection overruled.

Q. (By Mr. McEachen): And would you describe the continuity of the circuits from San Antonio on?

A. Well, the wires or the cables go right south of San Antonio, down to Laredo about 150 miles, on the poles and there at Laredo they go over the bridge across the Nueva Laredo and then they connect with the Mexican government lines [254] and I don't know how they route them down through Mexico. I am not familiar with that.

Q. Whereabouts, Mr. McGee, would you say the Western Union lines connect with the Mexican government lines?

A. Well, for all practical and technical purposes the boundary is in the middle of the bridge, is it,

(Testimony of M. G. McGee.)

the middle of the Rio Grande river and that is where they connect.

Q. Now, is that a continuous line directly through there?

A. It is a continuous line without a break.

They had a flood down there about two years ago and washed the bridge away and our wires were 55 feet above the bridge and it washed the wires away, too, and as the waters were going down, why, we, rather than wait for it to get all the way down we got the Air Force to take a helicopter and fly the wires across there to the Mexican side and there we furnished all the material and technical ability to reinstall the circuit and billed the Mexican government for their pro-rata part of it.

Q. Would you describe the stops that you mentioned at Dallas and San Antonio in the transmission of messages to Mexico City, as a relay?

Mr. Abbott: Object. The witness has exactly described what happens there. That is certainly more significant than a conclusionary term that we would apply. He said exactly [253] what happened. He mentioned the perforated tape, the taking off the transcription of the message to the blank and placing it on a new tape and whether we call it "relay" or some other word is immaterial in view of the details we have.

The Court: I will let him answer the question.

The Witness: Whenever there is a manual or retransmission of a telegram—from the start—in other words the telegram is put down in front of an

(Testimony of M. G. McGee.)

operator to send. That is the original sending or relay. In this instance it was considered a relay.

Mr. McEachen: No further questions.

Mr. Abbott: No further questions.

The Court: Is that all?

Mr. Abbott: Yes, your Honor. May counsel approach the bench?

The Court: Yes.

(The following proceedings were had at the bench and without the hearing of the jury:)

Mr. Abbott: This is our last witness just concluded, Judge, and there is just the matter of offering in evidence certain documents which have been marked for identification and not as yet admitted.

Mr. McEachen: I have a copy of your chart here so we can follow it.

Mr. Abbott: There are four exhibits marked for [256] identification and not in evidence yet. They come under the same general head. Those are Exhibits 5, a telegram to the Pommers from Walters, Exhibit 6, an envelope to Walters showing it was sent or postmarked at Los Angeles November 30th and some weeks later returned marked "unclaimed."

Then there is a telegram to the Thadens at San Antonio by a person signing his name as Hurst and Exhibit 10, a telegram from the person signing as Hurst to Thadens in Seattle.

Now, those four documents, your Honor, are all what is generally called a "cool-off" or "lulling messages."

They are designed on their face to advise the vic-

tims in such fashion that the victims will not protest to the authorities or at least will delay their protest.

Mr. McEachen: Are you referring to the witnesses in connection with other offenses?

Mr. Abbott: Both. Two of the documents relate to the Pommers and two to the Thadens.

Mr. McEachen: Let us separate them.

Mr. Abbott: We have a case directly in point under this very statute.

The Court: Just a moment. I am going to have to read your authorities.

Mr. Abbott: This is Wiltsey vs. United States, 22 Fed. 2d. 600. [257]

The head-note says:

"Telegrams which were lulling telegrams sent for the purpose of conveying assurances to victims of fraud and of preventing on their part action which might have interfered with carrying on the scheme, were sufficient to be considered as evidence of violation of this Section prohibiting fraud by wire, radio or telegram even though such telegrams were sent after the fraud was perpetrated."

Now, that case in turn is based——

The Court: Was there any review by certiorari on that case?

Mr. Abbott: No indication of any application to the Supreme Court, your Honor.

The Court: I am going to admit them. I am going to admit this, too, 7 and 7-A in evidence.

(The exhibits referred to, marked Plaintiff's Exhibits 7 and 7-A, were received in evidence.)

Mr. Abbott: Let me indicate by number all of the exhibits being offered.

The Court: You may have your objection.

Mr. McEachen: We may have our objection on all grounds——

The Court: All grounds you can think of.

Mr. Abbott: Let me state the numbers being offered: 5, 6, 9 and 10 are the communications which come under the [258] general category of killing messages and 7 and 7-A which are the records from Mexico and the English translation of the record from Mexico.

The Court: Yes. As I understand you do not question the correctness of the translation?

Mr. McEachen: No, we don't question that.

Mr. Matthews: We don't question it.

Mr. Abbott: That is all.

I would like to read these documents if I am permitted, your Honor.

The Court: Pass them to the jury. You will have enough to say without reading them. Pass them to the jury and let them examine them.

Mr. Abbott: I can renew the offer.

The Court: Renew the offer and it will be understood they will be received subject to defendants' objections.

Mr. McEachen: I will object to the introduction into evidence of Exhibits 1 through 12 on the ground that the corpus delicti has not been established in this case. And also with respect to the defendant Jensen, as shown by his affidavit on file in connection with a motion to dismiss, that the court

lacks personal jurisdiction over the defendant Jensen.

The Court: Motion denied.

Mr. Abbott: I will stipulate, if counsel desires, your [259] Honor, that the objections he has just made will be deemed renewed as here stated at the time that I make the offer in the presence of the jury.

Mr. McEachen: And on the further ground that the evidence offered with respect to the wire from Los Angeles to the Hotel Reforma, Mexico City——

The Court: That goes into the same question, really, of your entire defense in the case—it isn't interstate because it went to a foreign nation.

Mr. McEachen: That is right, and that is the substance of my objection.

The Court: I take the position if it goes to a foreign nation or not, if it crosses a state line it is a message sent across a state line.

Mr. Matthews: The cases cited don't indicate that.

The Court: No, but that is the position I am taking. There are not too many cases on this section.

Mr. Matthews: That is true, but the case I cite I think upholds our position.

Mr. Abbott: I know of nothing in that case that is inconsistent with the court's ruling.

Mr. McEachen: However, I want to cite as authority here the cases that I have already cited in my brief on the motion to dismiss in connection with the proposition that the message is by nature

a foreign message and consequently does not come [260] within Section 1343 of Title 18.

The Court: You have only stated that about 14 times so far, counsel.

Mr. McEachen: I only do it out of caution, your Honor.

The Court: You must be trying to keep up with Mr. Abbott when it comes to caution.

Mr. McEachen: Mr. Abbott is a hard taskmaster for all of us.

The Court: He is a perfectionist and you are trying to be even a greater perfectionist. You have made your record and I am sure it is well protected. We will proceed.

(The following proceedings were had in the presence and hearing of the jury:)

The Court: You may proceed.

Mr. Abbott: At this time the Government offers in evidence Exhibits 5, 6, 9 and 10 and 7 and 7-A.

The Court: They will be admitted subject to the objections heretofore made by counsel for the defendants.

(The exhibits referred to, marked Plaintiff's Exhibits 6, 7, 7-A, 9 and 10, were received in evidence.)

Mr. Abbott: I believe, your Honor, that there at this time no Government exhibits marked for identification but not admitted in evidence and I will ask that the clerk confirm that.

The Clerk: That is correct. [261]

Mr. Abbott: The Government rests, your Honor.

(Government rests.)

The Court: You may proceed.

Mr. McEachen: This is the proper time, if your Honor please, to make a motion under Rule 29-C of the Federal Rules of Criminal Procedure.

I believe I can accommodate both the court and jury by just one moment, if your Honor please. May we ask that the jury be withdrawn from the courtroom?

The Court: Approach the bench. I don't like for the jury to climb up and down these stairs any more than is necessary.

(The following proceedings were had at the bench without the hearing of the jury:)

Mr. Matthews: Make your motion and I will make the argument.

The Court: I am not going to listen to an argument. I know what the motion is and it will be denied. I simply want you to state your motion.

Mr. McEachen: At this time we move for a judgment of acquittal under Rule 29-C in the Federal Rules of Criminal Procedure.

This motion is based—strike that, Mr. Reporter. This motion is made on the basis of the previous motions to dismiss which are on file in the records of this court, including the [262] motion to dismiss on the grounds that the alleged offense is not within the statute, Title 18.

The evidence indicates that the message emanated as Los Angeles, which was the origin of that message and at that point designated for a destination in Mexico City and on that basis, due to the fact that the statute is silent with respect to—due to the

fact that the statute itself refers only to Interstate transmissions whereas——

The Court: Interstate you mean?

Mr. McEachen: Interstate, yes, your Honor. The Communications Act defines both interstate and foreign transmissions and therefore it appears obvious that Congress intended not to include foreign transmissions within the statute and thus being by its nature a foreign message as indicated by the cases cited in defendants' motion to dismiss, therefore we take the position that the Government has not made out a case under the statute.

The Court: Well, so I may be thoroughly understood on the record, I feel that any message that crosses state lines comes within the purview of the statute even if there was a direct wire between here and Mexico City. If the wire crossed a state line it was in interstate commerce and I think that was the purpose of the Act. The purpose of the Act was to prevent fraud by use of facilities of this type.

Even if the telegram was to France or Mexico City if they [263] used our wires and those wires crossed state lines— that is the messages crossed state lines the statute is intended to cover it.

Mr. Matthews: Now, your Honor, the defendants in this case——

The Court: I don't want to listen to an argument, gentlemen.

Mr. Matthews: I want this position that we take on the record.

The defendants in this case move for a judgment of acquittal on the grounds that there is no corpus

delicti of the offense established in connection with one of the main elements, namely the fraud within the confines of the United States of America, and there is no overt act of any kind committed by the defendants within the confines of the United States of America.

I am pointing out to the court on the basis of the Government's theory that we have a conspiracy here——

The Court: You have a conspiracy as far as the admissibility of evidence is concerned but we don't have a conspiracy charge.

Mr. Matthews: That is correct.

The Court: The motions will be denied and when you have finished your case you can make a similar motion, and I presume if there is a conviction that there will be a motion [264] for a new trial based on the same grounds. [265]

* * * * *

Los Angeles, California, May 23, 1956.

The Court: Stipulate the jury is present and in the jury box?

Mr. Abbott: So stipulated, your Honor.

Mr. McEachen: Yes, your Honor.

The Court: You may proceed with your opening argument.

Mr. McEachen: May we approach the bench, your Honor?

(The following proceedings were had at the bench and without the hearing of the jury):

Mr. McEachen: At this point, if your Honor please, it becomes incumbent upon me as attorney

for the defendants to renew the motion for judgment of acquittal, which will be based upon the motions previously made, the arguments which have been submitted, and in connection with those motions, and also the affidavits submitted and on the grounds which I have previously raised in connection with the motions.

Now, in connection with the instructions do you want to make the record on those at this time?

The Court: According to the Circuit Court of Appeals that motion has to be made after I instruct the jury.

I have the instructions before me that you have taken exception to.

Following my instructing the jury you may approach the bench and give to the reporter the instructions you objected [268] to and which I have here before me.

Mr. McEachen: All right, your Honor.

The Court: Motion denied. You may proceed.

* * * * *

The Court: A telegram is sent by means of interstate wire as those words are used in the statute and in the indictment, which I have read to you, if sent by a wire which crosses state lines, whatever may be its destination. [311]

* * * * *

The Court: Let us have your objections to the instructions.

Mr. McEachen: The objection to an instruction given, which is listed as Government's instruction 10, "a telegram is sent by means of interstate wire,"

as those words are used in the statute and in the indictment which I have read to you—"if sent by a wire which crosses the state lines, whatever may be its destination," that is objected to as not [320] being a proper statement of the law as indicated by the motions which have been filed, including the motion to dismiss and the argument made at the close of the Government's case under Rule 29-C, in that they do not properly present the law with respect to interstate and foreign communications, and specifically it is our position that the wire as transmitted from Los Angeles, its point of origin, was in essence a foreign wire and as such in foreign commerce and consequently not within the purview of Section 1343 of the United States Code.

I also make objection at this time under Rule 30, Federal Rules of Criminal Procedure, of the court's refusal to give an instruction which I will number "No. 2," which is as follows:

"The indictment refers to transmittal by interstate or foreign wire.

"Interstate transmission means transmission from any state, territory or possession of the United States to any other state, territory or possession of the United States.

"Foreign transmission means transmission from or to any place in the United States to or from a foreign country."

That is part of the Communications Act of 1934 as amended, Title 47, U. S. Code Section 153 of which, Title 18, [321] Section 1343 is a part and therefore these definitions as a part of the Com-

munications Act should be given in order to properly define the nature of interstate transmission by wire, and also a foreign transmission by wire and that they are two distinct matters.

Now, what I will designate as defendants' proposed instruction No. 4, which because it is short I will read:

"When the communication by wire shows the destination thereof at its point of origin, that fact is determinative of its character as an interstate or foreign communication."

I cite the case of Powell vs. United States, 112 F. 2d, 764 as authority for that proposition.

Briefly, that case holds that it is the nature of the document at its point of origin which determines its nature as an interstate or foreign transmission or communication.

Defendants' proposed instruction No. 5 which reads as follows:

"Interstate commerce does not include foreign commerce, unless Congress by definition for the purpose of a particular statute includes them both in a single expression."

I cite Border Pipe Lining Co. vs. Federal Power Commission, 151 F. 2d, 149, in which case a definite distinction is made between interstate and foreign commerce and that [322] they are mutually exclusive concepts and repeating the statement made in connection with the previous case, in that it is the nature of the transmission at the point of origin which determines whether or not it is an interstate or foreign transmission. [323] * * * * *

Los Angeles, California, Friday, May 25, 1956.

The Court: You may proceed.

The Clerk: 24,808 and 24,950, United States of America vs. Michael Victor Schlising, Emil Wentz and William Bering Jensen for sentence in the matter of Emil Wentz and William Bering Jensen.

The Court: You may proceed.

Mr. McEachen: Your Honor, I have given a copy of each of these motions to the United States Attorney, a motion for a new trial and a motion in arrest of judgment which I am filing in duplicate at this time, if your Honor please.

Mr. Abbott: I will acknowledge receipt this morning of each of those copies, your Honor.

Mr. McEachen: These motions are made upon grounds heretofore stated.

There is nothing new which appears in the motions. They are based upon the basic differences that we have already covered many times during the course of the trial, preceding the trial and on pretrial motions.

You did suggest at the pretrial motion filed on behalf of the defendant Jensen in connection with the personal jurisdiction element that you would make a determination of that after the trial was over and I assume it would be proper to consider that at this time. [339]

You originally denied the motion and I would think it would come up properly in connection with the motion in arrest of judgment because that goes to matters involving jurisdiction.

The Court: You have nothing new to offer then that you haven't already presented to the court?

Mr. McEachen: That is correct, your Honor, except that I could argue the point if your Honor would be interested in it.

The Court: I think you have argued it sufficiently and I hope and think your record is protected on that point. I am satisfied it is fully presented and if they are the same points you have made heretofore I understand them.

Mr. McEachen: Basically, your Honor.

The Court: It is basically the same proposition, that it did not come within the statute here?

Mr. McEachen: Yes, the element that I mentioned—that is that the matter of personal jurisdiction did not come within the jurisdiction of the court.

There were two underlying features of that. One is when a defendant is forced into this country he is denied any freedom of choice as to any legal remedy he might be able to pursue and, No. 2, it is a violation of, a technical violation of the laws of the United States—actually it is a kidnap.

The Court: Only recently our circuit court has held that [340] when a person is before the court, the court is not concerned with how he got there.

Mr. McEachen: That is true, but there is this other theory that was advanced in the Rosenberg case. The court didn't decide the issue but it did state that the motion was not made timely.

The Court: You made your motion before the trial so that question is not before us.

Mr. McEachen: Yes, your Honor.

The Court: All the court knows about it is what is set forth in the affidavits attached to the motion. I presume the Mexican government had a right to deport these men if they wanted to. We are not concerned with their methods of deportation.

Mr. McEachen: That is true, but the manner in which they were turned over to the agents of the United States Government make it appear as though they were working together.

The Court: That may be true, but questions have been raised here which I think call for the guidance of the circuit court.

I feel that this court does have jurisdiction of the defendants and I also feel that this offense comes within Section 1343.

I not only feel that way but Judge Mathes originally ruled on the motion to dismiss when that point was presented [341] and I have reviewed the points and authorities: I have read the cases and have given it considerable thought and I am in accord with his rulings. I think the statute was intended to cover situations such as we have here.

I realize that if the message had gone from here to Tijuana, we will say, we might have a different problem, but this message here involved did travel over interstate communication lines before it ever entered the Republic of Mexico and I feel this statute covers it.

As I told you before I will not deny them bail pending appeal because I feel there is a substantial question. I might say I do not feel there is a sub-

stantial question as much as I feel that when able counsel, and I wish to compliment both of you and Mr. Matthews, who is not here today, for the very courteous and fine manner in which your tried this case.

I felt that you co-operated with the court in expediting the matter. You presented the matter and I am satisfied you are serious in your position. Although I don't agree with you I feel that that in itself may raise a substantial question because it is easy to be wrong and when able counsel argue and present seriously a question on behalf of your clients I feel I should take that into consideration. I have absolute confidence in your sincerity and I say there may be a likelihood that I may be wrong.

For those reasons I am going to hold that there is a substantial question when it comes to the matter of appeal, but as far as I am concerned I feel confident that the offense as described in the testimony here is covered by Section 1343.

Is there anything more I can say?

Mr. McEachen: No. I appreciate your Honor's remarks. I do sincerely.

The Court: I am going to grant bail in this matter because I feel counsel have been sincere in presenting this point.

I realize there may be a different ruling from that which I have made here in this court and I think it is a proper case for a ruling by the Circuit Court of Appeals.

Ordinarily I would say there was no probable cause but in this case I am going to find there is

because I feel the case has been so sincerely presented and the points have been so sincerely urged and it is so easy for a court to be wrong. I appreciate that. I have been wrong so many times when I felt confident that it raises a question in my own mind when sincere counsel present a point that they sincerely believe in. It creates a reasonable doubt in my mind as to my own views. At least I feel it is a case in which it is proper to permit the defendants to be released on bail pending appeal. However, I have studied this section since the trial. [343] I have given it a lot of thought and up to now I see no reason at all for me to change my views. I do not mean that I may not be mistaken.

Mr. McEachen: I hope that I have placed the position that I take exactly in the manner that I should have. I know there are other cases that I could have presented but they would have been cumulative on the point.

The Court: Both you and Mr. Abbott have researched the case and this problem. It is virtually a new statute, as statutes go. I have made an independent research and I haven't found anything that is stronger than the cases you have presented.

I presume the motion for a new trial is based on the same grounds as your motion in arrest of judgment.

If the court has jurisdiction of this offense you don't question the sufficiency of the evidence, do you?

Mr. McEachen: Basically, your Honor has stated my position in that regard.

The Court: It is not your contention that the evidence is insufficient. The question is whether the statute covers the offense alleged.

Mr. McEachen: That is the underlying point.

The Court: That is the point.

Mr. McEachen: It underlies every objection that I raise, your Honor. [344]

The Court: Well, the motion for a stay and the motion for a new trial will be denied.

[Endorsed]: Filed July 18, 1956. [345]

[Endorsed]: No. 15248. United States Court of Appeals for the Ninth Circuit. Emil Wentz and William Bering Jensen, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: August 22, 1956.

Docketed: August 31, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 15248

EMIL WENTZ, et al.,

v.

UNITED STATES OF AMERICA

STATEMENT OF POINTS AND DESIGNATION OF RECORD UNDER RULE 17, SUBSECTION 6

Comes now the Appellants in the above entitled cause and pursuant to Rule 17, Subsection 6, of the Rules of the United States Court of Appeals for the Ninth Circuit and designate from the Reporter's Transcript of Proceedings the following record, together with a statement of points upon which they intend to rely.

Designation of Record

The complete transcript of the record prepared by the Clerk of the United States District Court.

Reporter's Transcript of Proceedings of May 14, 1956.

Reporter's Transcript of Proceedings of May 21, 1956, pages 5, 6 and 7 to line 7.

Reporter's Transcript of Proceedings of May 22, 1956, pages 211 to 219, line 4 inclusive.

Reporter's Transcript of Proceedings of May 23 to 25, 1956, page 240, line 6 to page 265, line 1 inclusive.

Reporter's Transcript of Proceedings of May 23 to 25, 1956, page 268 to 269, line 3 inclusive.

Reporter's Transcript of Proceedings of May 23 to 25, 1956, page 311, lines 5 to 8 inclusive.

Reporter's Transcript of Proceedings of May 23 to 25, 1956, page 320, line 18 to page 323, line 5.

Reporter's Transcript of Proceedings of May 23 to 25, 1956, page 339, line 1 to page 345, line 2 inclusive.

Statement of Points

Appellants will rely upon the following points:

The Government did not prove an offense against the laws of the United States: Title 18, Section 1343 of the United States Code applies to interstate communication only. The Government relied upon a foreign communication to prove its case.

The District Court erred in denying:

1. Defendants' Motion to Dismiss:
2. Defendants' Motion for a Bill of Particulars:
3. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction:
4. Defendants' Motion for a New Trial:
5. Defendants' Motion in the Arrest of Judgment:
6. Defendants' Motion for Judgment of Acquittal.

The District Court erred in refusing defendants' proposed instructions Numbers 2, 4 and 5, and in giving Government's proposed instruction number 10 (These instructions related to the nature of the communication as interstate or foreign.)

The District Court erred in admitting into evi-

dence Exhibit No. 11, a telegram from Los Angeles, California to Mexico City, District Federal.

Respectfully submitted,

/s/ ANGUS D. McEACHEN,
Attorney for Appellants

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 31, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD, RULE 17, SUBSECTION 6

Comes now the Appellee, United States of America, and pursuant to Rule 17, Subsection 6, of the Rules of the United States Court of Appeals for the Ninth Circuit, designates from the Reporter's Transcript of Proceedings the following testimony, which is material to the questions presented by Appellants' Statement of Points and Designation of Record under Rule 17, Subsection 6:

Reporter's Transcript of Proceedings of May 21, 1956, Page 7, Line 8, through Page 8, Line 24.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney

/s/ LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Sept 11, 1956. Paul P. O'Brien, Clerk.

Office - Supreme Court, U.S.
FILED
JUL 1 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. ~~1140~~ 2nd

EMIL WENTZ and WILLIAM BERING JENSEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Writ of Certiorari, to the United States Courts of Appeals, for the Ninth Circuit.

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Beverly Hills, California,
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ANGUS D. McEACHEN,
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SUBJECT INDEX

PAGE

I.

Summary statement of the matter involved 1

II.

Jurisdictional statement 3

III.

Questions presented 3

IV.

Statute involved 4

Appendices:

Appendix A:

Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 1

Appendix B:

Judgment ..... App. p. 10

Order Denying Petition for Rehearing ..... App. p. 10

Order Submitting Motion to Restore Appellants to Bail Status ..... App. p. 11

Order Directing Filing of Opinion ..... App. p. 11

Opinion of the United States Court of Appeals for the Ninth Circuit ..... App. p. 12

Certificate of Clerk, U. S. Court of Appeals for the Ninth Circuit, to Record Certified Under Rule 21 of the Revised Rules of the Supreme Court of the United States ..... App. p. 14

TABLE OF AUTHORITIES CITED

CASES — PAGE

Caywood v. United States, 232 F. 2d 220 7

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329 6

Morris v. United States, 156 F. 2d 525, 169 A. L. R. 305 9

Screws v. United States, 325 U. S. 91, 89 L. Ed. 1495 9

Texas & New Orleans Railroad Co. v. Sabine Tram Company, 227 U. S. 111 6

RULES

Federal Rules of Criminal Procedure, Rule 30 8

STATUTES

Communications Act of 1934, Sec. 3 (48 Stat. 1064) 4

Communications Act Amendments of 1952 (66 Stat. 711, 722) ... 4

Communications Act Amendments of 1952, Sec. 18(a) (66 Stat. 722) 9

Constitution of the United States of America (U. S. Govt. Print. Office, 1953) 10

Public Law 688 (July 11, 1956) 12

United States Code, Title 18, Sec. 1343 ..... 1, 4, 7, 9, 12

United States Code, Title 28, Sec. 1254 3

United States Code, Title 47, Sec. 152 3

United States Code, Title 47, Sec. 153(f) 6

United States Constitution, Art. I, Sec. 8, Cl. 3 9

MISCELLANEOUS

United States Code Congressional and Administrative News, No. 13, August 5, 1956, p. 3815 12

United States Code Congressional and Administrative News, No. 13, August 5, 1956, p. 4106 ..... 10, 12

IN THE

Supreme Court of the United States

October Term, 1957.

No. .....

EMIL WENTZ and WILLIAM BERING JENSEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Writ of Certiorari, to the United States Courts of Appeals, for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice, of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

An indictment was filed in the United States District Court, Southern District of California, Central Division, on April 25, 1956, alleging a violation of Title 18, Section 1343, United States Code, Fraud by Interstate Wire. The allegations therein contain statements that appellants devised and intended to devise a scheme to defraud alleged victims and to obtain money from them by means of false and fraudulent pretenses, known to be false and fraudulent

when made; that, for the purpose of executing the scheme and artifice, the defendants caused to be transmitted by interstate and foreign wire a signal and sound from the city and county of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico. After conviction in the District Court, the matter was appealed to the Court of Appeals for the Ninth Circuit, which court affirmed the decision of the District Court. A petition for rehearing in the Court of Appeals was denied. Pending action on the petition for rehearing, appellants were, on *ex parte* motion by counsel for the Government, remanded to custody and appellants' motion to be restored to bail was denied by the Court of Appeals, whereupon this petition for writ of certiorari is sought.

The matter was reported in the United States Court of Appeals for the Ninth Circuit in a written opinion numbered 15248 and filed on April 19, 1957. On petition for rehearing, a rehearing was denied by that court on May 31, 1957. On June 5, 1957, in a written opinion, the Court of Appeals denied appellants' motion for restoration to bail status. The opinions of the lower court to which reference was made are appended hereto.

The date and time of the entry of the judgment of the Court of Appeals sought to be reviewed is April 19, 1957. The date of denial of the appellants' petition for rehearing in the Court of Appeals is May 31, 1957.

II.

Jurisdictional Statement.

The statutory provisions believed to sustain the jurisdiction of this court is Section 1254 of Title 28 of the United States Code. The date of the judgment sought to be reviewed by certiorari is May 31, 1957, and the date of this application for certiorari is the 27th day of June, 1957.

III.

Questions Presented.

The questions presented for review expressed in the terms and circumstances of the case are:

1. Is a telegram sent by one person in Los Angeles, California, and addressed to another person in the Republic of Mexico an interstate communication within the meaning of the Communications Act Amendments of 1952 by reason of the fact that it crosses state lines after it leaves its point of origin in the United States and before it arrives at its destination in the Republic of Mexico?

2. Did the trial court commit reversible error in refusing to instruct the jury as to definitions pertaining to communications by wire as found in the 1952 Communications Act Amendments, Section 152 of Title 47, United States Code, and with particular reference to the definitions therein contained of interstate and foreign communications or transmissions.

IV.

Statute Involved.

The statute which the case involves is Title 18, United States Code, Section 1343:

> "§1343. Fraud by wire, radio or television.
>
> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

The section first appears in the 1952 Communications Act Amendments. See 66 Stat. 711 at 722.

Having its roots in the Communications Act of 1934 (48 Stat. 1064) one must be concerned with the definitions therein contained:

> "Sec. 3. For the purposes of this Act, unless the context otherwise requires—
>
> "(a) 'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things the receipt, forwarding, and delivery of communications) incidental to such transmission.
>
> * * * * * * * *

"(e) 'Interstate communications' or 'interstate transmission' means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Philippine Islands or the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not include wire communications between points within the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

"(f) 'Foreign communication' or 'foreign transmission' means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States."

V.

Appellants were indicted and convicted as a consequence of an alleged fraudulent scheme pertaining to a fixed horse race. The alleged solicitation was to put up good faith or guarantee money, whereupon the alleged victims lost Twenty-four Thousand Dollars ($24,000.00). The real matter for consideration here is the telegram dispatched from Los Angeles and addressed to Mexico City. The telegram crossed state lines in its routing from its point of origin at Los Angeles to its destination in Mexico City.

Appellants' position that the communication was a foreign one is best illustrated by reference to the Supreme Court Opinion in the case of *Texas & New Orleans Railroad Co. v. Sabine Tram Company*, 227 U. S. 111, at page 126, wherein the court states:

> "The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demands of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the devise of separate bills of lading the commerce will be given local character, though it be essentially foreign."

> "Courts of the United States are of limited jurisdiction, possessing only such powers as are either expressly or by necessary implication conferred upon them. There is no presumption in favor of their jurisdiction."

> *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371, 84 L. Ed. 329.

Since the telegram, which is the only means by which the court below acquired jurisdiction to hear and determine the questions presented by the indictment, on its face recites that it originated at Los Angeles and was transmitted to Mexico City, the definition in Title 47, United States Code, Section 153, subsection (f) applies. The plain lan-

guage thereof requires the conclusion that the wire did not bring the charge within the purview of 18 United States Code, Section 1343.

Title 18, United States Code, Section 1343, Fraud by Wire, being a part of the 1952 Communications Act Amendments, must necessarily be construed in the light of other pertinent portions of the 1952 Communications Act Amendments. The indictment herein alleged a scheme to defraud. It is the last paragraph thereof which must be construed as written, in the light of Communications Act Amendments of 1952. It alleges, as follows:

> "On or about November 22, 1955, defendants . . . for the purpose of executing the aforesaid scheme and artifice, caused to be transmitted by means of interstate and foreign wire a signal and sound from the city and county of Los Angeles, California, within the Central Division of the Southern District of California, to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico. . . ."

The function of the court is to construe the indictment as written. See:

Caywood v. United States, 232 F. 2d 220, at page 231.

Under the Communications Act, Amendments of 1952, and specifically the definition therein of "foreign communication" or "foreign transmission," the gravamen of the offense alleged would be a communication or transmission from Los Angeles, California, to Mexico City, Mexico. The very definition fits squarely with the case at bar, namely, communication or transmission from any place in the United States, to-wit, Los Angeles, California, to a foreign country, to-wit, the Republic of Mexico.

Government counsel argues, in paragraph two, page 14 of his brief, that the words "and foreign" are descriptive only, do not constitute a necessary part of the indictment, and could have been wholly omitted without doing violence to the statement of the offense. In the light of the definition given by Congress in the Communications Act, Amendments of 1952; it would appear proper to assert that the definition itself, when applied to the indictment, eliminates the notion of interstate communication or interstate transmission and, therefore, the term "interstate" could and should have been wholly omitted therefrom.

Whether or not the chain of transmission was broken was a question of fact and should have been submitted to the jury under proper instructions.

Appellants requested instructions which would have permitted the jury to determine this question. The court refused to give the requested instructions to the jury. Appellants made timely objection to the refusal to charge as requested, giving the grounds for the objections before the jury retired. Rule 30 of the Rules of Criminal Procedure was complied with.

By enacting the Communications Act of 1934 and the 1952 Amendments thereto, Congress had prescribed the standards upon which the guilt or innocence of the appellants were to be determined. It was the duty of the court to provide the jury with instructions which would set out the standards to be applied in the present case. This the court refused to do. Defendants' proposed instruction number 2 was refused by the lower court. The court below gave Government's proposed instruction number 10, as follows:

"A telegram is sent by means of interstate wire as those words are used in the statute and in the indict-

ment. If sent by a wire which crosses the state lines, whatever may be its destination. . . ."

This instruction given does not comply with the standards set out in the Communications Act, Amendments of 1952.

In *Screws v. United States* (1945), 325 U. S. 91, 89 L. Ed. 1495, a conviction was reversed for failure to define the crime charged by reciting the essential ingredients thereof, even though counsel did not except to the trial court's charge to the jury. The court stated:

> "Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which congress has prescribed."

In *Morris v. United States* (9 Cir.), 156 F. 2d 525, 169 A. L. R. 305, which was an appeal from a conviction after trial by jury, the court stated:

> "It is our opinion that the trial court committed fatal error in failing to instruct the jury on the statutes and regulations defining and governing the offenses charged against the appellant . . . the court did not define the offense of which the appellant was charged and was being tried and the jury was given no opportunity of applying the facts to the law. . . ."

While the Communications Act defines foreign communication and transmission, Section 18(a) of the Communications Act Amendments, 1952, 66 Stat. 722, 18 U. S. C. 1343, refers only to interstate communications. It was the theory of the government and the lower court that a telegram which crosses state lines is interstate, whatever may be its destination. This is not the law. This theory violates a fundamental concept under the Commerce Clause.

United States Constitution, Art. 1, Sec. 8, Cl. 3.

money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of (interstate) wire, radio or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than 5 years, or both.'

"Last year a case arose in which it was alleged that the subject in the execution of a scheme to defraud used the telephone, calling from a point in Mexico to Los Angeles, Calif. Because of the limitation in the statute to frauds involving 'interstate' wire, radio, or television communication it was concluded that the telephone call from Mexico, being not an interstate communication but rather a foreign communication, was not covered by the section.

"This case demonstrates the need for amending the statute so that it will reach not only interstate communications but foreign communications as well. If so amended, the statute will cover, for example, telephone calls from Canada made by fraudulent stock promoters to victims residing in the United States. Furthermore, the amendment would remove any doubt as to the applicability of the statute to a communication between a State and a Territory or between a State and the District of Columbia.

"A draft of a bill to accomplish the suggested amendment is enclosed for your consideration and appropriate action.

"The Bureau of the Budget has advised that there is no objection to the submission of this recommendation.

"Sincerely,

.....
Attorney General."

On July 11, 1956, Public Law 688 was enacted by Congress Amending Section 1343 of Title 18, United States Code as follows: Page 3815 of *U. S Code Congressional and Administrative News*, No. 13, August 5, 1956.

> "Section 1343 of title 18, United States Code is amended to read as follows:
>
> §1343. Fraud by wire, radio, or television.
>
> "Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.
>
> "Approved July 11, 1956."

It was stated at page 4106 of *U. S. Code Congressional and Administrative News*, No. 13, August 5, 1956, as follows:

> "This bill is designed to close a loophole in the present law, which limits the prosecution of frauds involving wire, radio, and television communication to interstate transactions only. It would extend this coverage to foreign communication as well."

VI.

The present controversy involves a study of the fundamental distinction between transactions which are interstate in nature and, as such, burdened to some extent by the police power of the state, and those transactions which are by nature in foreign commerce and thereby not subject to state regulation in any of their aspects. The determination of this case involves the determination of a question which is of public importance.

The decision of the Court of Appeals appears to be in conflict with decisions of this court and other Courts of Appeals on the same general subject matter. The Court of Appeals appears to have sanctioned the usurpation by the District Court of a function of Congress in giving its own definition of terms already defined by an act of congress.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the Court of Appeals for the Ninth Circuit, demanding said court to certify and send to this court a full and complete transcript of the record and the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket No. 15248, *Emil Wentz and William Bering Jensen, appellants, vs. United States of America, appellee*, to the end that this cause may be reviewed and determined by this court, as provided by the statutes of the United States, and that the judgment herein of said Court of Appeals be reviewed by this court. Petitioners further

pray that, pending the disposition of this petition by this court, they may be admitted to bail upon giving bond acording to law in such sum as the court may deem proper, the bond to be approved by the Clerk of said Court of Appeals, for the Ninth Circuit, or otherwise, as this court may direct, and for such further relief as to this court may seem proper.

Respectfully submitted,

JOSEPH T. ENRIGHT,

Attorney for Petitioners.

ANGUS D. MCEACHEN,

Of Counsel.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Emil Wentz and William Bering Jensen, Appellants, vs. United States of America, Appellee. No. 15,248. Apr. 19, 1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Fee and Chambers, Circuit Judges.

Chambers, Circuit Judge:

Wentz and Jensen[1] were indicted and convicted as a consequence of a fraudulent scheme wherein Frank X. Pommer and Selma H. Pommer were the victims. A federal case was made out of it by adding the charge that "for the purpose of executing the * * * scheme and artifice (the defendants) caused to be transmitted by means of interstate and foreign wire a signal (*i.e.* a Western Union telegram) and sound from the City and County of Los Angeles, California, within the Central Division of the Southern District of California to Dallas, Texas, thence to San Antonio, Texas, and thence to Mexico, District Federal, Republic of Mexico."

The "flim-flam" involved many of the usual facets. A fixed horse race, fantastic winnings. The solicitation to put up "good faith" or guarantee money. Then the victims put up and lose $24,000.

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[1]Indicted with Wentz and Jensen was a third defendant named Schlising who was arrested in Texas with Jensen. Schlising made bail and failed to appear for the trial which began May 21, 1956, in Los Angeles. A severance for Schlising was granted. The trial proceeded as to Wentz and Jensen.

The testimony has been so excised, as was proper, that the only incident for consideration here is the telegram dispatched from Los Angeles and addressed to Mexico City. We do not know how it fitted in to the plan or scheme, or with certainty who actually sent it. But it is conceded that there was adequate testimony to convict the defendants if the telegram's "course" is covered by the applicable statutes.

The accused telegram, omitting Western Union symbols, is:

Los Angeles, Cal.
Nov. 22, 1955

"J. E. Walters
Hotel Reforma
Mexico, D.F., Mexico

"Leaving Wednesday 3:45; arriving Mexico 11:15 P.M.
Love

"Selma"

We assume that "Selma" was the victim Selma Pommer. We suppose the defendants sent the telegram for her or caused her to send it. No point is offered questioning the message as the corpus of the *corpus delicti*.

The telegram went over Western Union lines to Dallas, Texas. There it took tangible form and was retransmitted by Western Union on a wire to its center in San Antonio. There it had a tangible form. From San Antonio it was dispatched by Western Union to Mexico City over a direct wire without interruption. The message again reproduced in tangible form at Mexico City was delivered there by the telegraph agency of the Government of Mexico. The telegraph line from San Antonio to Mexico City is of

some importance. The wire is owned by the Western Union Company from San Antonio to a point on or about the international bridge over the Rio Grande River between Laredo, Texas, and Neuvo Laredo, Mexico. There it connects with a wire of the publicly owned Mexican telegraph agency. The wire runs continuously to Mexico City. The impulses released on the wire by Western Union at San Antonio carry the message to Mexico City without interruption. In Mexico City the message is received and reduced to tangible form.[2] It is not material, but it may be assumed that a message out of Mexico City to Los Angeles would follow the same procedure exactly in reverse. It appears from the record that on such a message as is the focal point here a charge for the service is made by Western Union at Los Angeles. Later the amount is divided upon some accounting basis with the Mexican agency.

The section involved in the indictment, as it read at the time of the alleged offense, was as follows:

"§1343. Fraud by wire, radio or television.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television

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[2] Apparently the electric impulse on the wire from Los Angeles is received by an automatic machine at Dallas which makes a "reperforation" on a tape. (Probably, the first perforation is made by the sending machine in Los Angeles). The reperforation at Dallas is run through another automatic machine which transmits it to San Antonio. It would seem that at San Antonio the message comes in over an automatic machine called a printer. This printer writes out the message that goes into the Western Union files. Also, there is a reperforation at San Antonio which is used for retransmission through another automatic machine to Mexico City.

communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

The section first appears in the 1952 Communications Act Amendments, See 66 Stat. 711 at 722.

Having its roots in the Communications Act of 1934 (48 Stat. 1064) one must be concerned with the definitions therein contained:

"Sec. 3. For the purposes of this Act, unless the context otherwise requires—

"(a) 'Wire communication' or 'communication by wire' means the transmission of writings, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * * * * * * *

"(e) 'Interstate communication' or 'interstate transmission' means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Philippine Islands or the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not include wire

communication between points within the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

"(f) 'Foreign communication' or 'foreign transmission' means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States."

From the beginning of their legal troubles these two defendants have persistently and repeatedly asserted that their act was a foreign communication. They say that what they did was not proscribed by the statutes of the United States until 1956[3] when Section 1343, Title 18, was added to read as follows:

"§1343. Fraud by wire, radio, or television.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

If the addressee had been in San Antonio the defendants necessarily would concede they had offended. They have found a loophole, they believe. And if they have found one, they are entitled to go free. It is not for a court to stretch a statute to cover something not covered.

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[3] A time after the crime, if any, was committed.

A court should not strain either way. It must seek the plain natural meaning as best it can.

The government practically admits that if the message had crossed the California line at San Diego and thence across Mexico into Mexico City then there would be no violation. That would be a foreign communication: a foreign transmission without an interstate aspect. And this court believes such an interpretation was probably correct prior to the 1956 amendments.

Inasmuch as §1343 of the Criminal Code came into being in 1952 as a Communications Act amendment, naturally the definitions of the 1934 Communications Act are germane. The 1952 act proscribes transmission "by means of interstate wire" for the purpose of executing the fraudulent scheme.

It seems clear that Sec. 3(a), *supra*, indicates that more elements may be required for a communication than for a transmission. Communication may imply receipt by the addressee, or at least arrival of the message at the destination. Transmit, we take it, means to send across. And there were really three transmissions of this message: (1) The interstate transmission Los Angeles to Dallas. (2) The retransmission intrastate in Texas from Dallas to San Antonio. (3) The foreign transmission from San Antonio to Mexico City. Therefore, when the message ceased to be an electric signal at Dallas and took on tangible form for retransmission it would appear that the *corpus delicti* of the crime was complete.[4]

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[4] An alternative possible concept is that there was just one transmission from Los Angeles to San Antonio. But the chain of transmission was in any event broken at San Antonio, if not at Dallas. The legal result is the same as if the chain of transmission first broke at Dallas.

It may be argued that this construction cuts across subdivision (e) of Section 3, *supra;* that in "e," when it is said, "'Interstate communication' or 'interstate transmission' means, communication or transmission from any state * * * to any state," necessarily interstate communication and transmission are identical. But this court says Section 3(e) means the same as if it read "interstate communicaion means interstate communication from any state to any other state and interstate transmission means interstate transmission from any state to any other state." We believe that the design of the statute was to proscribe the interstate use of wires. This was done with the message which is the hub of this case.

Defendants bear down heavily on the proposition that foreign commerce is not interstate commerce; *ergo,* a foreign communication which includes interstate aspects is not an interstate communication. They rely heavily on the case of Border Pipe Line Co. v. Federal Power Commission, D. C. Cir., 171 F. 2d 149. There the Border Company operated a natural gas pipeline wholly in Texas. It delivered gas at a point on the Texas side of the border to a Mexican consumer who took the gas on in his own pipeline to Mexico where he used it in his industry. The natural gas act was limited to gas in interstate commerce. Obviously, the Border Company's activities would be hard to drag in under the term interstate commerce. But we do not read that case as reaching the question that would have arisen if the gas had flowed from Texas to New Mexico and thence across to Mexico.

In view of the 1956 amendment to §1343, there may not be too many more cases coming to construe the section as it was adopted in 1952. Many variations of the same

facts under the 1952 act, we do not consider we have reached. Among them: (1) Suppose the Los Angeles operator sent the impulses for the message here over the identical lines (with the same division of ownership of lines and division of service fee) without interruption to Mexico City. (2) Suppose Western Union owned the same line all of the way over the same course and the message was sent interrupted from Los Angeles to Mexico City.

It is a cliche to say that legislation is "inartfully drafted." It does appear, if the defendants' message had had no interstate aspects, that there was an obvious loophole in the statute. But straining neither to hold tight nor to open a gate, it is the court's best judgment that the loophole was not big enough for these defendants. Interstate transmission was proscribed. They had one.

The defendant Jensen has a second point. In the district court he made a timely objection which asserted that the court had no personal jurisdiction over him. Four days after his indictment on May 14, 1956, he moved to dismiss the indictment upon the basis of an affidavit he made and filed. It said: That he was seized and detained in Mexico City on January 17th by Mexican authorities. In Mexico he was at all times denied an attorney. No proceedings were ever held for him in Mexico. He was transported by automobile (by whom not stated) from Mexico City through Nuevo Laredo, Mexico, to Laredo, Texas, where he was turned over to "certain agents of the United States government." Thence he was taken to the United States Commissioner.

As noted, the motion requested the indictment be dismissed because of lack of personal jurisdiction, which lack

purportedly arose out of the events related above. The non sequitur of the motion (dismissal of indictment because no personal jurisdiction yet) we shall ignore. We do, however, believe we should notice that defendant Jensen's counsel misstates the record facts when in his brief he says, "Personal jurisdiction of appellant was acquired by the federal court through the illegal acts of federal officers."

No illegal act of a United States officer is related by Jensen. In the affidavit no action of officers of the United States begins before the defendant is brought to them in the United States. Therefore, the charge, if true, must be that the defendant was denied "due process" in Mexico by Mexicans. If true, that is no legal concern of an American court.

When American officers participate in an abduction from a foreign country (beyond merely receiving a man pushed out of a foreign country) there will then be time to consider whether the forced confession cases relied on by Jensen have some effect on jurisdiction over the person, and, if so, what effect.

The judgments of conviction are affirmed.

(Endorsed:) Opinion. Filed Apr. 19, 1957.

Paul P. O'Brien, Clerk.

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Emil Wentz and William Bering Jensen, Appellants, vs. United States of America, Appellee. No. 15248.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment

Filed and Entered: April 19, 1957

PAUL P. O'BRIEN, Clerk.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Friday, May 31, 1957.

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered, that the petition of Appellants, filed May 18, 1957, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, June 4, 1957.

Before: STEPHENS, CHAMBERS & HAMLEY, Circuit Judges.

ORDER SUBMITTING MOTION TO RESTORE APPELLANTS TO BAIL STATUS

Ordered motion to restore appellants to bail status argued by Mr. Angus D. McEachen, counsel for the Appellants, and by Mr. Louis Lee Abbott, Assistant U. S. Attorney, counsel for the Appellee in opposition thereto, and submitted to the Court for consideration and decision.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Wednesday, June 5, 1957.

Before: STEPHENS, CHAMBERS and HAMLEY, Circuit Judges.

ORDER DIRECTING FILING OF OPINION

Ordered that the typewritten *per curiam* opinion this day rendered by this Court in above cause on motion to restore appellants to bail be forthwith filed by the Clerk.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Court of Appeals for the Ninth Circuit.

Emil Wentz and William Bering Jensen, Appellants, vs. United States of America, Appellee. No. 15,248. June 5, 1957.

On Motion to Restore Appellants to Bail.

Before: STEPHENS, CHAMBERS and HAMLEY, Circuit Judges.

PER CURIAM:

On April 19, 1957, this court affirmed the conviction of Wentz and Jensen. ..... F. 2d ..... Thereafter, the district court revoked the bail of $20,000 of the appellants, and the marshal holds Wentz and Jensen. The petition for a rehearing was denied on May 31, 1957. There is yet time for certiorari.

The questions of appellants' appeal are not frivolous. If that be all there is to the matter, defendants should continue at large while they seek certiorari.

The very size of the original bail indicates some apprehension of the district court as to the prospective responsiveness of the defendants to orders of the court.

This court cannot warrant its own legal opinion of the defendants' guilt, but it can appreciate that these defendants who play for high stakes now may not feel their case is progressing too well. The district court may well and correctly believe that there is now a danger of

flight of these defendants which was not so great six months ago. It is evident that its latest determination was made on the basis of the presence of an increasing danger of flight, and to the exclusion of any consideration of the merits of the appeal. It says so. This court cannot and should not on this record overturn the district court's ruling. To us it would seem that the district court's concern may be well founded.

The application here is denied. If certiorari should be granted, defendants may renew their application in the appropriate court.

(Endorsed:) *Per Curiam.* Opinion on Motion to Restore Appellants to Bail. Filed June 5, 1957.

Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Emil Wentz and William Bering Jensen, Appellants, vs. United States of America, Appellee. No. 15248.

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and thirty-five (135) pages, numbered from and including 1, to and including 135, to be a full, true and correct copy of the entire record, excluding original exhibits, of the above-entitled cause in the said Court of Appeals, made pursuant to request of counsel for the Appellants, and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-first day of June, 1957.

.....

PAUL P. O'BRIEN, Clerk.

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No. 240

In the Supreme Court of the United States

October Term, 1957

EMIL WENTZ AND WILLIAM BERING JENSEN,

PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	3
Conclusion	6

CITATIONS

Cases:

United States v. *Young*, 232 U.S. 155 5
Ward v. *United States*, 76 S. Ct. 1063 6

Statutes:

Federal Communications Act of 1934, 48 Stat. 1064, Sec. 3(e) and (f) 4
18 U.S.C. 1343, as enacted July 16, 1952, 66 Stat. 722 ..... 2, 4

Miscellaneous:

H. Rep. No. 388, 82d Cong., 1st Sess., p. 1 5
S. Rep. No. 44, 82d Cong., 1st Sess., p. 14 5

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 244 F. 2d 172.

JURISDICTION

The judgment of the Court of Appeals was entered April 19, 1957 (Pet. App. 10). A petition for rehearing was denied May 31, 1957 (Pet. App. 10). The petition for a writ of certiorari was filed July 1, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a telegram sent from California to Mexico, which was sent via Texas where it was recorded and sent on, was transmitted "by means of interstate wire" within the purview of 10 U.S.C. 1343, as enacted in 1952 before its amendment in 1956.

STATUTE INVOLVED

18 U.S.C. 1343, as enacted July 16, 1952, 66 Stat. 722, provided:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of interstate wire, radio, or television communication, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.[1]

STATEMENT

Petitioners were convicted in the United States District Court for the Southern District of California under an indictment charging that on November 22, 1955, in execution of a scheme to defraud they "caused to be transmitted by means of interstate and foreign wire a signal and sound from the City and County of Los Angeles, California * * * to Dallas,

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[1] The statute was amended on July 11, 1956, 70 Stat. 523, to punish representations, etc. "transmitted by means of wire, radio, or television communication in interstate or foreign commerce".

Texas, thence to San Antonio, Texas, and thence to Mexico * * *" (R. 3-6). Each defendant was sentenced to imprisonment for five years and to pay a fine of $1,000 (R. 31-32). On appeal, the judgments were affirmed.

The only issue raised is whether the telegram which formed the basis of the indictment was "transmitted by means of interstate wire", within the purview of 18 U.S.C. 1343, as it read at the time of the crime before the 1956 amendment added transmissions in foreign commerce to the coverage of the statute. The message was sent from Los Angeles to Mexico City by Western Union which has no direct lines from California to Mexico City. A message is normally sent, as this was, from Los Angeles to Dallas, Texas, where an automatic machine makes a reperforation on tape. It is then sent to San Antonio and from there by Mexican lines into Mexico City. At San Antonio a full copy is made of the message before it is retransmitted over Mexican lines (R. 63-65).

Petitioners objected to the portion of the judge's charge which instructed the jury that a telegram was within the purview of the statute "if sent by a wire which crosses state lines, whatever may be its destination" (R. 91-92).

ARGUMENT

The evidence in this case was that the telegram in question was transmitted by wire from California to Texas where it was twice reproduced in a tangible form before being forwarded, again by wire, to Mexico City (*supra*, this page). This procedure was

necessary because there was no direct line from California to Mexico City. Thus the facts bring the case within the literal terms of 18 U.S.C. 1343, since the message was "transmitted by means of interstate wire."

The petitioners argue that, since the ultimate destination of the telegram was Mexico City, the transmission was foreign rather than interstate (Pet. 5-7). There might be a basis for this position had the message proceeded directly from California to Mexico, or had it passed through Texas without interruption. Here, however, it is undisputed that there was first a transmission of the message to Texas and then a retransmission from Texas to Mexico City. Therefore the petitioners' argument has no application to the facts of this case.

The petitioners also argue that the statute (*supra*, p. 2) is to be interpreted so that the words "interstate wire" are part of a single phrase with the word "communication" to read "interstate wire communication"; that this term is defined by Section 3(e) and (f) of the Federal Communications Act of 1934 (the 1952 amendments of which included this section, 66 Stat. 711) to require a receipt of the message in Texas and to exclude a foreign communication; and that the trial court's instructions to the jury covered a transmission through Texas to a foreign destination without regard to any receipt in Texas. This argument depends on reading the words "wire" and "communication" as a single phrase, an interpretation not required by the language. Unless the statute is so read there is no occasion to turn to the definitions of

the Communications Act.[2] Moreover, even assuming petitioners' interpretation, on the basis of the instructions given by the trial court, the jury could not have convicted without in fact finding that there was a receipt of the message in Texas, since the only evidence introduced by the government of any type of interstate transit was dependent on the transmission through Dallas, Texas. Therefore, to find interstate transmission at all, the jury must have accepted the evidence of transmission to Texas and retransmission to Mexico.

In any event, whatever the correct interpretation of the statute as it was before the 1956 amendment, Congress has now changed the law so that foreign as well as interstate commerce is specifically covered. This deprives the issues raised by the petition of any importance for future cases. There is no conflict and no need for further review by this Court.[3]

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[2] The definitions involved are designed to apply to the regulatory system set up by the Act. The section of the law here in question was originally passed by the House as a separate bill and incorporated into the Communications Act in the Senate. It was intended by both houses "to establish for radio a parallel provision now in the law for fraud by mail." S. Rep. No. 44, 82d Cong., 1st Sess., p. 14; H. Rep. No. 388, 82d Cong., 1st Sess., p. 1. Under the mail fraud law even incidental use of the mails has been held sufficient to establish federal jurisdiction. *United States* v. *Young*, 232 U.S. 155. It therefore seems unlikely that Congress intended the technical definitions applicable to the regulatory phase of the statute to limit the scope of the fraud provision.

[3] Petitioners ask for admission to bail pending action on the petition (Pet. 14). After the affirmance of the conviction, the district court revoked its order admitting petitioners to bail. Petitioners made a motion for restoration to

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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bail. After a hearing, the district court denied the motion "entirely upon the possibility of this defendant absconding" (R. 115). The Court of Appeals, after a denial of a petition for rehearing, ruled that on the record it should not overturn the district court's conclusion that there was danger of flight (R. 134-135). Certainly the possibility of flight was a proper matter for consideration by the district court, whose conclusions should not be disregarded. See opinion of Mr. Justice Frankfurter in *Ward* v. *United States*, 76 S. Ct. 1063.